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CONTENTS

				PAGES.
Articles 141—150
Reports 503—551

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THE SUPREME COURT JOURNAL.

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1954

[XVII

THE FUTURE OF ENGLISH IN INDIA

[This is read at the Third All India Writers Conference (P.E.N.) Annamalai-nagar]

B)

V G RAMACHANDRAN M.A., B.L.,

Address: TIRUCHOILUR

‘ Mr President and Brother Men-of Letters

I crave your permission to read this paper on the ‘ Future of English in India ’

With the emergence of India as a free republic, free to mould its own destiny in the comity of free nations of the world, the question has arisen whether India should develop a national language of her own and exclude the usage of English altogether. There can be no doubt whatever as to the utter desirability of expanding Hindi as the common language of the country though even on this in some parochial minded States such as the Tamilnad, there is propaganda against Hindi. These protagonists would see in it a menace to the growth of Tamil the regional language. But at the same time they forget that if Hindi is not developed, there is no other language which could take the place of English which hitherto has been the language of the courts, officers, colleges and public forum in the whole of India. These regional zealots would even like the medium of instruction in colleges and schools to be wholly in the regional language in all subjects including mathematics, science, etc. They would object to Hindi being used for any such purpose.

The question therefore arises if it is advisable at all to remove English from its old position as the language pre-eminently fitted for official and non-official purposes. With all the prejudice engendered in very many States against Hindi, it will be preposterous to do away with English which has practically been recognised as one of the languages of India. If English is erased from common use I venture to fear that parochialism will run riot in the States of India and instead of cohesion we will herald division. We are not patriotic enough to popularise Hindi and slowly emancipate it as the official language of all India. Even if we achieve this, the question further arises if it is not advantageous to India to encourage the spread of love for the English language. It cannot be gainsaid that it is not our regional languages that brought about our freedom. It is English which took deep root in the soil of India for the last one century, that animated us, united us and put us on to an enquiry and drove us to fight our battle of freedom. Our modern civilisation is entirely due to the English language. The Bengalee, the Tamil, the Gujerati, the Telugu, the Punjabi, etc., all met under the leadership of Mahatma Gandhi

who by his magic spell expounded in simple English the utter need for getting rid of foreign bondage

But for the English language, there would have been no cementing force in the peoples of India. That is the truth, the whole truth. We have learnt English and have begun to think of it as our own. As Dr C P Ramaswamy Iyer put it, the grandeur of our culture is one of assimilation from wherever we find it. We found English good, useful and noble. We found it useful for exchange of ideas as between man and man, State and State within India, country and country outside India. We produced stalwarts such as the late V S Srinivasa Sastri, that good and humble Servant of India who spoke English better than Englishmen. The English of Jawharlal Nehru as revealed in his *Discovery of India* and numerous other books, the English of Rabindranath Tagore, Sarojini Devi, Dr C P Ramaswamy Iyer, Sri K M Munshi, the late Sri S Satyamurthy and a galaxy of other publicists in India is the envy of the world. We have perfected and ennobled English and we could call English in a way as our own. We have grown in our stature in India and in the international field by the use of that language.

Let us not reduce our size or stature by disowning English which is, as it were, part of our assimilated culture. There is no shame in such assimilation. Hindu Dharmaic history shows how it had grown through ages by such assimilation. Buddha and his doctrine was antagonistic to the Hindu Sanatanist ideal but we saw Buddha hailed latterly as a Hindu avatar and his teachings imbedded in our religious literature. Language also grew richer by such assimilation. The most ancient language of India, Sanskrit has enriched the various regional languages. Tamil as it is commonly used has such admixture from other languages including English.

That deterioration creeps in if once we lower our objectives, is made apparent, in the fetish we have exhibited in our mania for Tamilising everything. In the Madras State we pushed through in the school stages Tamil as the medium in science and mathematics, we reduced the importance of English. What is the result? Pigmies are the result. The students' growth got stunted as the Tamil equivalents for scientific terms was a retrograde step in the acquisition of knowledge which had an easier vehicle in English. Our Graduates of the post Independence days are equivalent to the Intermediate college boys of the pre Independence days. That is the whole truth. The result is we have a desire as exhibited by this Annamalai University to introduce an entrance course for one year after the S.S.L.C. so as to fit the boy to a collegiate course. All this trouble arose on account of our fetish for the regional language at the expense of acquisition of true knowledge by a convenient vehicle of thought. We are doomed if we think only of Tamil and ignore Hindi and English. We are likely to be in the vanguard of civilization if we retain only Hindi, and ban English or -Pon it to rust.

Let me recall the golden words of Dr C P Ramaswamy Iyer which he uttered in his Convocation Address at Poona in September, 1953, where he lamented the false pride indulged in by parochial elements. He said "So much prejudice has been imported into the discussion of this 'English' question that it is almost a matter of pride for many students and some even of the teachers to say that they do not bother themselves about the English language which was forced on us by foreigners. In the result the knowledge even of fairly simple English spoken, or written is progressively deteriorating." Then again the learned Vice-chancellor of the Annamalai University adverted to the danger of over-emphasising

even Hindi at the expense of English. He posited "Having admitted the importance of developing our own national language for many administrative purposes and to eliminate the segregation of the so called elite from the masses of our countrymen, we must note that the world has now contracted and that the new and rapid means of communication and the present international status of India have necessitated continuous and lively contacts with the rest of the world not only in the trade and commerce but in all aspects of knowledge and activity in order that the men and women of India may play their part worthily in the several directions in which they may have to proceed. It is well not to ignore or oppose the inevitable claims of a tongue which owing to many historical and other accidents is rapidly becoming the universal language of today and has displaced most of its other rivals like Spanish, French and German."

So it is foolish to retreat from our international contacts. We will be doing that if we ignore English which is now the only world language. The appeal of Indian scientists like Sir C. V. Raman or Jagadish Chandra Bose, or of statesmen like Nehru and Rajaji in the international sphere is due to their English language. Our Nehru occupies world eminence on account of his capacity to deliver the goods in English. Our international contacts, our courts, our business and our administration will doubtless suffer if we erase English from India. It is not a question of how soon we should get rid of English. The question is if we should give up "English" at all? It has become part and parcel of our growing civilization. We may not disown or refuse to enrich our indigent national culture on that account. By all means we shall develop Tamil, Hindi and Sanskrit. But on no account shall we reduce the place of English in all essential matters where we require it. To replace English is rather difficult. We can doubtless make Hindi the common language of all Indians to speak to each other or write to each other. In certain matters of lesser import in the official sphere Hindi could be used. Hindi could also be the vehicle of expression in the colleges and schools. But even there how far Hindi could supply enough fluent and intelligible vocabulary for scientific expressions in chemistry, mathematics, physics, natural science, etc. is yet to be seen. Developing our knowledge of sciences in this rigid way will hardly lead us to further discoveries. Our science would become regurgitated and stunted in growth, not being able to follow world thought in the sphere of science which can only be in English.

It may be stated we could translate important foreign books into Hindi. But this is to ignore practical difficulties. I venture to quote again Dr. C. P. Ramasamy Iyer from his Poona Convocation Address. There was an experiment in this direction made by the Osmania University in relation to Urdu and it was found that by the time that an important text book was translated into Urdu another edition had come out. Further at the present day the progress of knowledge is chronicled and stimulated by periodicals, magazines, and critical literary or scientific reviews published weekly, monthly or quarterly. Most of the results are available in English. To translate all these magazines and reviews as and when they appear would be financially and practically a monumental task. To translate even a fraction of the million of books extant in English in all categories of literary, artistic and scientific creativity is a Herculean labour. To ignore or to shut ourselves out from these contributions to knowledge would be to handicap ourselves. There

are few literatures in the world which can rival the English language in the variety, comprehensiveness and many-sidedness of its output'

So to deny our children this grand vehicle of thought, English, is to deny them the great opportunities we have had in current civilized thought. Our youth will get stunted in outlook and pigmies in stature. We will lose the reputation we had gained in the international world. No more could we send a Ramasamy Mudaliar or persons like the late N. Gopalasamy Ayyangar to international conferences. Our youth who go for foreign studies will be at a sore disadvantage. The universal vehicle of thought is English and India stands to gain by retaining her resplendent standard in the knowledge of English. This has verily become traditional with India. This All India Writers' Conference is itself a proof of the excellence of English as a medium for exchange of the latest thought. You just replace this by Hindi. I am sure it will be a dismal failure though we may cover it up by a grand national aroma around that Hindi may capture the market place and probably also the home. But it has yet to develop vocabulary to capture literature, science and law. Even if it does—and I am sure to achieve that, it may require more than fifty years—even then it cannot replace English in the sphere of international thought. We have to train our ambassadors, politicians, and administrators with a fluency in English. Our law courts cannot interpret modern juristic ideas except in English. At any rate the High Courts and the Supreme Courts cannot function without English for a century and more. Even at the district level, while examination of witnesses may be in the regional language or Hindi, the judgment of courts cannot but be in English as the law of the land with its complex legal terms and technicalities inherited from English jurisprudence, cannot be reduced to Hindi. Hindi has not any great literary past as Sanskrit. Hindi is yet to be developed. The Law Lexicon, Constitutional law, Law of property, Contract, Specific relief, Easements, etc. cannot be easily translated into Hindi. The numerous Law reports which form precedents from 1880 to 1954 which run into millions of volumes cannot easily be translated into Hindi. Nor can the thousands of Law textbooks be so attempted. So it is high time that we, free Indians, realize that there is no limit to one's acquisition of knowledge. There is no limit to one's thirst to read all languages inclusive of English. It is not against the tenets of true patriotism if we retain our knowledge of English, which as we stated before due to various historical factors have had a permanent footing in India. Let it be understood it is to our advantage nationally and internationally if we stick to our stock of English which has become the biggest factor in the world as the most widely known language of international thought. Let us who have become tall on account of our association with the English language not reduce ourselves to the stature of frogs in the pond refusing to see the vast sea ahead. Let us shed our inferiority complex in thinking that a knowledge of English will make us inversely shrink in our output of patriotism. We may develop Hindi as the efficient national language and also develop our regional language for local use but it will be suicidal if on this score we minimise the importance of English. English should always be retained as a compulsory language in schools and colleges. It is good also to make Hindi compulsory if only we shed our inner complex for the regional language. The growth of the latter and the love for it can in no way jeopardise the spread of Hindi. It is preposterous to say we are patriotic Indians and yet are against developing Hindi as our national language. It is still more ugly when we declare our fiat

against English. If both Hindi and English are taboo how are we to evolve ourselves through the regional language?

Our Bharat will soon get vivisected into many linguistic autonomous States and probably the federal structure of our union will break to pieces. The federal structure is kept up by a common citizenship, one Supreme Court, one All India Administrative service, one federal Parliament the working of all of which is to be facilitated by one common Indian language Hindi and one international language English. So if Hindi and English go out of the picture, then the disintegration of our federal structure will begin parochial and State patriotism taking up the ascendancy. We must realize that during the British period English being the official language was also the language of scholarship and international intercourse. Sanskrit was our ancient heritage and it is to Sanskrit and English that the regional languages looked to for development of power and richness of thought. But with the advent of our Independence the first flush of patriotism is to drive out English, all at once, without regard to the extent it is replaced by Hindi. Hindi cannot so easily replace English. Sri K. M. Munshi, Governor of U. P. one of our stalwart nationalistic thinkers and men of letters put it pathily in his recent broadcast talk. "By an over enthusiastic effort at removing English from its place Hindi has not gained. It has lost. Nationalism is suffering an eclipse. Regional consciousness is growing. Our greatest danger to day is militant linguism. The linguistic Balkanization of India is bringing serious consequences in its wake.

English to day is a powerful unifying factor in our national life. It is the language of administration at a higher level of law and scholarship of inter regional and international intercourse. It will take years before educated men of to-day could think in Hindi or the regional languages. These languages have yet to develop greater expressive power by keeping in touch with English. The juristic standard in the country depends upon the legal literature of Anglo Saxon world. I cannot imagine a Supreme Court judge delivering judgment in Hindi with the same accuracy of thought and expression as in English for a considerable time to come.

Sri K. M. Munshi however felt that the Regional language and Hindi must be encouraged in their respective spheres but that that did not mean driving out the English language from Bharat. The transition if at all from English to Hindi must be gradual and sure. Even after Hindi takes the entire field English has an important role in the progress of cultural, social and international relations with other nations of the world. Sri Munshi wound up his address in telling words. 'Today English is ours. With its aid we can make ourselves felt throughout the world. It would be therefore criminal to ignore or neglect English in this country.'

The pace of the growth of Hindi is rather chequered. The regional languages do not seem to yield to Hindi in very many States. In North India in non Hindi areas the effort is vigorous to replace English but alongside the effort to plant Hindi is very noticeable. In the South the movement against Hindi is ominous and the craze for the regional language is almost reaching the dangerous point of breaking national unity. To quote again Sri K. M. Munshi 'English therefore needs to continue in the foreseeable future as the optional and at higher level the only language of administration. A realistic picture would advocate the retention of English as the masses of India as yet have not taken to Hindi. It will

be interesting to recall the news (*vide* Indian Express, 11th February, 1951, page 6) from Ahmedabad that a high ranking officer of the State Government is reported to have asked the Ahmedabad Municipal Corporation to send urgent correspondence in English to avoid procedural delays in the disposal of important questions concerning local Self Government. Thus English is preferred for urgent business.

CONSTITUTIONAL POSITION

Having dilated so much on the need for retention of English as the major vehicle of thought in our country it will be appropriate to examine how our Constitution makers visualized the matter when they framed the Constitution of India. The relevant article of importance in the Constitution are Articles 343 to 351, Articles 28 (2) and 337. Article 343 declares Hindi (Devnagari script) as the official language of the Union except that for a period of fifteen years from the commencement of the Constitution the English language shall continue to be used for all official purposes of the Union. There is a proviso that the President of our Republic may during the aforesaid period by order authorize the use of Hindi in addition to English for any of the official purposes of the Union. But after the said period of 15 years, Parliament is given the power to make a law for the use of English or Hindi for such purposes as may be specified by law. Article 344 casts a duty on the President to constitute a commission at the end of 5 years from the commencement of the Constitution or thereafter 10 years from such commencement, to enquire and make recommendations to the President as to the progressive use of Hindi for the official purposes of the Union as to restrictions to be placed on the use of English for official purposes of the Union the language to be used in the Supreme and High Courts of India the language of the legislation, etc. These recommendations should be made by the commission having due regard to the industrial, cultural, and scientific advancement of India and the just claims and interests of persons belonging to non Hindi speaking areas in regard to the public services. The President may give effect to the recommendations of the whole or any part of the report. In effect Articles 343 and 345 posit that there need be no extinction of the English language but only restriction of its user without jeopardising the industrial, cultural and scientific advancement of India. Despite the President's powers to regulate it, there is a clean charter extended to Parliament to authorize the use of English even after the stipulated fifteen years. This is so because English has come to be regarded as almost an Indian language, without whose nourishment the further progress of India will stand in great jeopardy.

With respect to the States in India Articles 345 envisages that the State may by law, adopt any one or more of the languages in use in the State or Hindi as the language to be used for all or any of the purposes of that State. But English will continue as the official language till the State legislates differently. Article 346 posits that the language of official communication between State and State and between State and the Union will be the language which is authorised for the time being for use in the Union for official purposes. Article 348 posits that the language to be used in the Supreme Court and the High Courts, and for Acts, Bills, etc., shall be English until Parliament by law otherwise provides. Though Article 348, clause (2), permits the Governor or Rajpramukh of State with the prior consent of the President, to authorise the use of Hindi or other language for official purposes in proceedings in the High Courts of the State, yet judgments decrees or orders of the High Courts are not affected thereby. In Article 351 we have the special directive which casts

a duty on the Union to promote the spread of Hindi language, to develop it and enrich it by assimilating from other languages of India inclusive of Sanskrit

Thus we see in the Constitution there is no provision which directs the English language to be driven out, only its restriction is permitted. Its extinction is not at all aimed. The President's power to direct the user of English even after 15 years from the commencement of the Constitution and a further Parliamentary power to retain the user of English for any length of time—these are guarantees for the safety of the English language in our land. Militant linguism in a State cannot liquidate English so easily when the President and Parliament have the ultimate say in the matter. This is indeed a wholesome check on democracy in the States as sometimes it may run amock in the frenzy of parochialism. The President's power is not absolute. He has to give his directions basing it on the recommendations of the Commission duly appointed by him.

The provisions are enabling in their nature authorising Parliament to provide for the user of English for a longer period. There is no provision for cessation of English in a mandatory form. In respect of courts Article 348 enables the High Courts and the Supreme Court to continue to use English until Parliament otherwise provides by law. There is no time limit set for this. It must need be so. The language of these High Courts and the Supreme Court cannot but be English. I would even urge that it should be so permanently. For the law of the land cannot be laid down in any other language. Hindi can never replace English in this sphere where technicality, procedure, substantive law, precedents, etc. require a good knowledge of English. Judgment can yield sense only if written in English. Further our law reports were respected in other countries also and our growing constitutional law has its attraction to and from American and English law. There are also questions of international law. English appears to be the only vehicle of international thought. So it is well-nigh impossible to replace English in the Supreme Court and the High Courts. No doubt in the District Court and the Munsiff Court, we can give encouragement to the regional language so far as pleadings and examination of witnesses are concerned.

Arguments may with difficulty be addressed by counsel in the regional language. But in complicated cases it will be a rather difficult task to attempt it except in English. Further there is no use arguing in Tamil if the judgment cannot but be in English. In the mofussil courts also the judgment has to be written in English on account of the complexities of law and legal procedure. At best we can have a translation of those judgments also in the regional language but this may not serve any useful purpose if English has to be the language of the High Court.

It is our confirmed view that so far as law courts are concerned as even the Constitution does not fix a time-limit it will be unsafe to change the language of the High Courts and the Supreme Court at any time to Hindi from English. So far as mofussil courts are concerned judgments should be only in English though the language of the court may be regional. In the field of Governmental administration offices, English should not be erased at higher levels. Hindi may be utilized at lesser levels. In the field of Local Self Government the regional language may be used at the lower levels while Hindi may be used at the higher levels. It is only by some such adjustment for years to come, say even for another twenty five years or more can we progress *pari passu* in the development of the regional language, Hindi and English, without leading to any clash between them. In the field of

education, collegiate education should continue to be solely in English with Hindi coming next in preference. In the field of high school education both English and Hindi should be made compulsory but the regional language may be given all the importance up to the secondary stage. In the high school, however, the regional language may also be given as a special optional subject to such of those who want to specialize in it. The importance of Sanskrit will also have to be recognized by giving it the same status as the regional language in the high school and secondary school stages. The anomaly of the recent Bombay Government order leading to Hindi being used as the medium of instruction in the Intermediate classes while it is not so in other colleges in that State and other States is hardly to be welcomed. There must be uniformity in all these matters even if we commit an error of judgment. There will be a jarring jolt in collegiate education if English is the medium in some colleges and Hindi in some other colleges. This will yield to anomalous results and difficulties. The future of our youths will be in jeopardy. If there is a rule enunciated it should at any rate be the same within one State at least while it is certainly desirable that it shall be universal to the whole of India applicable to all universities. Governments run by popular ministries in a democratic set up should bestow all the thought before they change the medium. In Bombay there appears to be a vendetta or a fiat against English. The Ministry there have not taken care to see that Hindi had sufficiently advanced to take the place of English. As Sri Munshi said the effort to displace English is too vigorous without a corresponding effort to raise Hindi to take its place. How the Bombay Government fared in its treatment of Anglo Indian schools, at the hands of the Bombay High Court is a matter of utmost concern for all of us, to wonder as to the need for the utmost caution in banning English education for our youths. In this connection we shall refer to Articles 29 and 337 of our Constitution. It must also be remembered that in the Chapter on Fundamental rights Article 29 protects cultural and education rights. It posits that no citizen shall be denied admission to any educational institution maintained by the State or receiving State aid on grounds only of religion, race, caste or language or any of them. Article 30(2) prohibits discrimination in the matter of State grants to educational institutions on the ground that it is under the management of a minority whether based on language or religion. Article 337 affords protection to educational institutions run for the benefit of Anglo Indians and which receive State grants. The grants will continue for 10 years but at least 40 per cent of the annual admissions therein shall also be made available to members of other communities than the Anglo-Indian community. We have traversed the above provisions (Articles 29 and 337) particularly to reveal the importance of the recent judgment of the Bombay High Court *vis a vis* the Bombay Government order to English schools prohibiting admission of non Anglo-Indian students in so far as no Indian languages were taught there. Their Lordships (Chagla C J, and Datta, J) observed "It might be English was a foreign language and was brought in by foreigners. In a sense it might be so but it had been recognised by the Constitution and as such was entitled to protection as any other language. Therefore they had to consider whether it was constitutional to make any distinction between the English language and the other Indian languages." Their Lordships felt they could not do so and on the question whether the State can control the parent and tell him to educate his children according to the curriculum fixed by the State, their Lordships thought that no parent could be prevented from choosing the Anglo-Indian schools."

method of imparting education to his child. The liberty to experiment with the child and choose the kind of education for him is a right of the parent and this is in accord with the declaration of human rights to which India was a party. Their Lordships felt that to deny admission to non-Anglo Indians would also contravene Articles 30 (2) and 337.

It must be understood that we should cease to view English as a foreign language. It has become part of us, part of our culture, part and parcel of our bed-rock of progress. It will be petite in this connection to quote Dr A. Ramasamy Mudaliar, Vice-Chancellor of Travancore University in his latest Convocation Address at Nalanda. He said 'To-day English was neither the language of any nation, nor of any imperial power. It was the language through which knowledge of modern science, technology, medicine and various other subjects was most widely communicated. I feel that we are shutting the door against this vast treasure-house of knowledge, shutting the door against progress itself, by banning the study of English. I am convinced that in colleges an adequate knowledge of English should be considered essential so that the scientific and professional courses of study might continue to be properly understood for many years more.'

These words coming as it does from an elder statesman, a man of-letters, of international reputation are worth their weight in gold. No less emphatic is Dr A. Lakshmanaswami Mudaliar, the veteran Vice-Chancellor of the Madras University. If men of their stature Sri K. M. Munshi and Dr C. P. Ramaswami Iyer view that English should be fostered by us rather than buried by us it is a tragedy that in democratic India politicians who manage to get propped up into official positions want to show off their patriotism by decrying English. They do not know what they do, that they are virtually committing not only their own suicide but helping, aiding and abetting the suicide of future generations. Our youth will lose all their stamina for progress if English is banned. They will be a zero in the future world where distance, space, etc., is compressed by the advance of science and speed of locomotion, where a knowledge of English is of the utmost necessity to move in this complex world and where your regional language cannot take you further than your doorstep or the market place. Education is not political propaganda. Politicians should not dabble in education unless they know enough of it. Education is something apart from mere propaganda. It is the life-breath of the nation, the beacon of progress and propeller of current and future thought.

It is not good—half-baked politicians tinkering with this problem without expert advice of veteran educationists. Our language difficulties and educational system can only be viewed from the sole point of national advancement on cultural and economic plane. They can be never viewed from the narrow partisan views by warring political parties, who may vie with one another to push their doubtful dogmas under cover of national advancement. It is to prevent this lopsided political manoeuvring at state level that the President of the Republic and Parliament are given the sole power to guide the nation as to the desirability of continuing English after the stipulated fifteen years. State Governments manned by politicians of lesser vision cannot abrogate English from the higher levels of administration without the consent of the President. The field of High Courts, the Supreme Court and inter-State communication, etc., are also outside their purview. This is all to the good. If English goes, the strength of the federal centre will get dan-

gerously reduced by the fissiparous militant linguism of the States. In the ultimate analysis the will of Parliament can be changed in favour of retention of English only by the strength of informed public opinion which must assert itself.

The duty is therefore cast on all publicists, educationists and administrators to focus public attention on the desirability of retaining the use of English language in courts, colleges and higher levels of administration. To this end, English language must be taught as a compulsory subject in the schools and colleges. If public opinion is not strong it is likely members of Parliament may be swayed by other forces to do away with English as token of patriotic fervour, however wrong and false the latter notion may be.

It is doubly incumbent on a vigilant public, publicists, educationists, and men of responsibility to send their clarion call to the Parliament of our nation to retain English in its present position in the very interests of our national progress.

May I conclude that this august assembly of men-of letters of All India, give its blessings to the retention of English for all time in India in the interest of our national advancement and national culture.

I thank you all for your extreme kindness and forbearance, enabling me to read this paper at this Conference on a subject which is of such pregnant importance to the future of India.

‘ Jas Hind ’

on an officer as a penalty. It involves loss of benefit already earned. The officer dismissed or removed does not get pension which he has earned. He may be granted a compassionate allowance but that, under Article 353 of the Civil Service Regulations, is always less than the pension actually earned and is even less than the pension which he would have got had he retired on medical certificate. But an officer who is compulsorily retired does not lose any part of the benefit that he has earned. On compulsory retirement he will be entitled to the pension, etc., that he has actually earned. There is no diminution of the accrued benefit. It is said that compulsory retirement, like dismissal or removal, deprives the officer of the chance of serving and getting his pay till he attains the age of superannuation and thereafter to get an enhanced pension and that is certainly a punishment. It is true that in that wide sense the officer may consider himself punished but there is a clear distinction between the loss of benefit already earned and the loss of prospect of earning something more. In the first case it is a present and certain loss and is certainly a punishment but the loss of future prospect is too uncertain, for the officer may die or be otherwise incapacitated from serving a day longer and cannot, therefore, be regarded in the eye of the law as a punishment. The more important thing is to see whether by compulsory retirement the officer loses the benefit he has earned as he does by dismissal or removal. The answer is clearly in the negative. The second element for determining whether a termination of service amounts to dismissal or removal is, therefore, also absent in the case of termination of service brought about by compulsory retirement.

The foregoing discussion necessarily leads us to the conclusion that a compulsory retirement does not amount to dismissal or removal and, therefore, does not attract the provisions of Article 311 of the Constitution or of rule 55 and that, therefore, the order of the President cannot be challenged on the ground that the appellant had not been afforded full opportunity of showing cause against the action sought to be taken in regard to him. Both the questions under consideration must also be answered against the appellant.

The result, therefore, is that this appeal fails and must stand dismissed. In the circumstances of this case we make no order as to costs.

Agent for Respondent No 2 *R H Dhebar*

Appeal dismissed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

MEHRCHAND MAHAJAN, *Chief Justice*, B K. MUKHERJEA, VILIAN BOSE & H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

The State of Madhya Pradesh

*Appellant**

G C Mandawar

Respondent

The State of West Bengal

Intervener

Fundamental Rules—Rule 44—Grant of dearness allowance under—If can be enforced by Government servant by mandamus—Different rates of dearness allowances to servants under State and Central Governments—If discriminatory and void—Constitution of India (1950), Articles 14 and 226

Rule 44 of the Fundamental Rules confers no right on the Government servants to the grant of dearness allowance, it impose no duty on the State to grant it. It merely confers a power on the State to grant compassionate allowance at its own discretion, and no *mandamus* can issue to compel the exercise of such a power. Nor, indeed, could any other writ or direction be issued in respect of it, as there is no right in the applicant which is capable of being protected or enforced.

Once the Government passed a resolution fixing a scale of allowance under Rule 44, that would be 'law' as defined in Article 13 (3) (a) of the Constitution, and if that law infringed Article 14 it could be declared void.

Under the Constitution the Union and the States are distinct entities, each having its own executive and legislature, with their powers well defined.

When a law is impugned under Article 13 what the Court has to decide is whether that law contravenes any of the provisions of Part III of the Constitution. If it decides that it does it has to declare it void; if it decides that it does not it has to uphold it. The power of a Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation it might be open to the Court to disregard the form and treat them as one law and strike it down if in their conjunction they result in discrimination. But such a course is not open where as in the instant case the two laws sought to be read in conjunction are by different Governments and by different legislatures. Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different Article 14 can have no application. The result therefore, is that the scale of dearness allowance recommended by the Central Pay Commission and sanctioned by the Central Government can furnish no ground for holding that the scale of dearness allowance recommended by the Committee (appointed by the State Government) and adopted by that State Government is repugnant to Article 14.

The impugned Resolution of the Madhya Pradesh Government fixing dearness allowance rates lower than that fixed by the Central Government cannot be held to be bad under Article 14.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 10th September, 1953, of the High Court of Judicature at Nagpur in Miscellaneous Petition, No. 123 of 1953.

M. C. Seelchand, Attorney General for India (*T. P. Nair* and *I. N. Shroff*, Advocates, with him) for Appellant.

M. A. Lambiar, Senior Advocate, (*Rajinder Narain*, Advocate, with him) for Respondent.

B. Sen and *P. K. Bose*, Advocates, for Intervener.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The point for decision in this appeal is whether a Resolution of the Government of Central Provinces and Berar, now Madhya Pradesh, dated 16th September 1948 fixing a scale of dearness allowance to be paid to its servants is repugnant to Article 14 of the Constitution.

The circumstances under which the above Resolution came to be adopted may be briefly mentioned. Consequent on the war, there was a phenomenal rise in the price of foodstuffs and of other essential commodities, and among the persons worst hit by it were the Government servants. As a measure of relief to them, the Central and the Provincial Governments sanctioned a grant of grain allowances to them under various Resolutions passed in 1940. The scheme adopted by the Central Government was that its employees stationed in various Provinces received the same benefit as the respective Provincial Government em-

ployees. But this scheme was found to be unsuitable for employees of the Central Government, as the allowances granted by the Provincial Governments were not uniform. On 10th May, 1946, the Central Government appointed a Central Pay Commission, hereinafter referred to as the Commission, to enquire into and report on the conditions of service of its employees with particular reference to "the structure of their pay scales and standards of remuneration with the object of achieving a rationalisation, simplification and uniformity to the fullest degree possible". The Commission which was presided over by Sir S. Varadachariar, recommended by its report, dated 3rd May, 1947, the grant of dearness allowance on a specified scale. On 27th May, 1947, the Government of Central Provinces and Berar appointed a Pay Committee, hereinafter referred to as the Committee, "to examine the recommendations of the Central Pay Commission and to report the extent to which and the modifications subject to which these recommendations should be accepted by the Provincial Government, so far as Government servants under its rule-making control are concerned". By its report, dated 22nd June, 1948, the Committee recommended the grant of dearness allowance on a scale which, though practically identical with that adopted by the Commission in respect of salaries above Rs. 400 per mensem, was less than it as regards salaries of Rs. 400 per mensem or less. These recommendations were accepted by the Government by its Resolution, dated 16th September, 1948. This difference in the result between the two scales not unnaturally caused considerable dissatisfaction among the employees concerned, and after unsuccessful attempts to get redress on the executive side, they filed through their representative, the respondent, the present application under Article 226 of the Constitution.

In the petition it was alleged that "the State Government should have uniformly adopted the Government of India rates for all its servants and the discrimination in making the two-fold slab and accepting the Government of India rates for one slab, i.e. for servants receiving salary over Rs. 400 and not accepting them in respect of the other slab, i.e., of servants drawing below Rs. 400 is highly discriminatory", that "the State Government servant has a right to be treated equally with the Central Government servant similarly situated", and that "every servant has these fundamental and natural rights and the petitioner and the members of the Ministerial Services Association have a right to demand from the respondent the Dearness Allowance at the Government of India rates". The petitioner then prayed

"That declaring that all ministerial servants are entitled to the Government of India rates of Dearness Allowance or in any case adequate Dearness Allowance the State Government should be directed by a writ of *mandamus* or by any other suitable writ or direction to cancel the discriminatory rules of Dearness Allowance and adopt the Government of India rates to all servants without discrimination or in any case to provide with adequate rates of Dearness Allowance sufficient to provide reasonable subsistence for them.

The Government contested the petition on the grounds, firstly, that the claim for dearness allowance was not justiciable, and secondly, that the difference in the scales of dearness allowance adopted by the Commission and by the Committee did not violate Article 14. The learned Judges (Sinha, C.J. and Bhutta, J.) held that under the Rules dearness allowance was placed on the same footing as pay, and that the claim relating thereto was, therefore, justiciable, and that the differentiation made between the employees of the Central Government and of the State Government in the matter of the grant of dearness allowance rested on "no intelligible and reasonable basis", and that the Resolution, dated 16th September,

1948, was therefore bad. They accordingly issued a direction to the State Government that they do reconsider the question of dearness allowance payable to the employees concerned. It is against this judgment that the present appeal has been preferred by the State Government on a certificate granted under Article 132 (1) of the Constitution.

It is argued on behalf of the appellant firstly that the grant of dearness allowance is a matter *ex gratia* and not justiciable, and that neither a writ of *mandamus* nor any direction could be issued with reference thereto, and secondly, that the Resolution, dated 16th September 1948, is not hit by Article 14 of the Constitution. In our opinion, both these contentions are well founded.

On the first question Rule 44 of the Fundamental Rules runs as follows:

Subject to any restrictions which the Secretary of State in Council may by order impose upon the powers of the Governor General in Council or the Governor in Council, as the case may be, and to the general rule that the amount of a compensatory allowance should be so regulated that the allowance is not on the whole a source of profit to the recipient, a Local Government may grant such allowance to any Government servant under its control and may make rules prescribing their amounts and the conditions under which they may be drawn.¹

Under this provision, it is a matter of discretion with the local Government whether it will grant dearness allowance and if so, how much. That being so, the prayer for *mandamus* is clearly misconceived, as that could be granted only when there is in the applicant a right to compel the performance of some duty cast on the opponent. Rule 44 of the Fundamental Rules confers no right on the Government servants to the grant of dearness allowance; it imposes no duty on the State to grant it. It merely confers a power on the State to grant compassionate allowance at its own discretion and no *mandamus* can issue to compel the exercise of such a power. Nor, indeed, could any other writ or direction be issued in respect of it, as there is no right in the applicant which is capable of being protected or enforced.

The learned Judges of the High Court relied on certain rules which put dearness allowance on the same footing as pay for certain purposes, and held on the authority of the decision in *The Punjab Province v Pandit Tara Chand*² that the present claim was justiciable. But *The Punjab Province v Pandit Tara Chand*² was an action for recovery of arrears of salary, and it was held that under the law of this country which differed in this respect from that of England, arrears of salary were a debt due by the Government, that they could be attached in execution of a decree under section 60, Civil Procedure Code, as a debt, and that on that basis an action to recover the same was maintainable. This decision was quite recently approved by this Court in *State of Bihar v Abdul Majid*³, wherein it was pointed out that salary was not in the nature of a bounty, and that whatever was recoverable by a Petition of Rights in England could be recovered by action in this country. This question may therefore now be taken to be settled beyond controversy. But we are not concerned in the present proceedings with any debt payable by the Government. The claim is not to recover arrears of dearness allowance which has accrued due under the rules in force relating thereto. The claim now put forward is to compel the Government to grant dearness allowance at a particular rate, and under Rule 44 of the Fundamental Rules, such a claim is a matter of grace and not a matter of right. In England, no petition of right will lie in respect of such a claim. The position is thus stated in Halsbury's Laws of England, Volume IX, page 688, Note(s).

¹ 1947 F.C.R. 39, 10 F.L.J. 56.

² (1954) S.C.J. 300, A.I.R. 1954 S.C. 245.

It is erroneous to suppose that a petition of right will lie for matters which are of grace and not of right [*De Bode (Baron) v R*].

That is also the law in this country where an action is a substitute for a petition of right. In the result, we must hold that the matters raised in the petition are not justiciable.

Mr Nambiar, the learned counsel for the respondent did not dispute the correctness of this position. But he argued that when once the Government passed a Resolution fixing a scale of allowance under Rule 44 that would be law as defined in Article 13 (3) (a) of the Constitution and if that law infringed Article 14 it could be declared void. That is a contention which is clearly open to him, and the question therefore that falls to be decided is whether the Resolution dated 26th September, 1948, is bad as infringing Article 14.

Now, the scheme which has been adopted in the impugned Resolution is firstly that dearness allowance is to be paid to the employees on a scale graded according to pay, different rates being adopted for different slabs and there being a progressive reduction of the rate from the lowest to the highest category. No contention is raised that fixing different rates of dearness allowance for different slabs of pay is obnoxious to Article 14. Secondly within any given slab, the scheme places all the employees in the same position except that in the lowest ranks a slightly higher rate is fixed for residents in the cities of Nagpur and Jubbulpore, which again has not been attacked as discriminatory. These being the features of the scheme, there can be no room for the contention that it has made any discrimination.

Mr Nambiar does not contend that there is anything in the scheme or in the Resolution adopting it, which brings it within the prohibition enacted in Article 14. His contention is that the Committee whose recommendations were accepted by the Government adopted the rates suggested in the report of the Commission as regards Government servants who drew a monthly salary of over Rs 400, but when they came to those employees who drew a monthly salary of Rs 400 or less they discarded the rates fixed by the Commission and instead adopted different and lower rates, and that this was discrimination hit by Article 14. In other words, the impugned Resolution though valid in itself as not infringing Article 14 becomes void under that provision when it is taken in conjunction with the report of the Commission. We do not find anything in Article 14 which supports this somewhat startling contention. Under the Constitution the Union and the States are distinct entities, each having its own executive and legislature with their powers well defined. Article 12 defines the State as including the Government and the legislature of each of the States. Article 13 (2) enacts that the State shall not make any laws taking away or abridging the rights conferred by Part III and Article 14 enacts that

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

On these provisions, the position is that when a law is impugned under Article 13, what the Court has to decide is whether *that* law contravenes any of the provisions of Part III. If it decides that it does, it has to declare it void, if it decides that it does not, it has to uphold it. The power of the Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different

laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where, as here, the two laws sought to be read in conjunction are by different Governments and by different legislatures. *Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments.* The sources of authority for the two statutes being different, *Article 14 can have no application.* The result, therefore, is that the scale of dearness allowance recommended by the Commission and sanctioned by the Central Government can furnish no ground for holding that the scale of dearness allowance recommended by the Committee and adopted by the appellant is repugnant to Article 14. It may no doubt sound hard that Government servants doing work of a similar kind and working, it may be even in the same place, should receive different allowances, but the rights of the parties have to be decided on legal considerations, and it is impossible to hold that the Resolution in question is bad under Article 14.

It was argued on behalf of the appellant that the assumption underlying the argument of the respondent with reference to Article 14 that the Committee had adopted the Report of the Commission in part and rejected it in part was itself without foundation. In the view we have taken on the applicability of Article 14, this question has no practical importance, but as all the materials have been placed before us we may briefly express our opinion thereon. In paragraph 80 of the Report the Committee observed that while the Commission based its scale on the cost of living index, they themselves adopted the current level of prices as the basis for fixation of dearness allowance. In paragraph 89 they further observed that in fixing the scale on the basis of the cost of living index the element of pay had also been taken into account, but that as they had revised the scale of basic pay, they were not including it in fixing the dearness allowance. In paragraph 31, they observed that unlike the Commission they were taking into consideration the financial resources of the State in fixing the scale. Thus, the Committee approached the problem from a different angle, and applied different principles in fixing the scale of dearness allowance, and if the two schemes produced the same results at some stages that was due to coincidence and not to adoption of the report of the Commission by the Committee. Mr Nambiar also referred us to two Resolutions of the appellant, dated 4th January, 1951 and 6th October, 1951, adopting the scale fixed by the Commission in respect of certain other categories. That has no bearing on the question whether the Committee whose recommendations were approved by the Government had adopted in part the Report of the Commission so as to result in discrimination. The facts stated above show that the Committee went into the matter independently, and viewed the question from a different standpoint, and in formulating the scheme which they did, they did not adopt the Report of the Commission, though they derived considerable assistance from it.

In the result, this appeal must be allowed and the petition of the respondent dismissed; but in the circumstances, there will be no order as to costs either here or in the Court below.

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHRCHAND MAHAJAN, *Chief Justice*, VIVIAN BOSE AND GHULAM

HASAN, JJ

Manulal Mohanlal Shah and others

Appellants*

v

Sardar Sayed Ahmed Sayed Mahmud and another

Respondents

Civil Procedure Code (V of 1908) Order 21 rules 72 84 85 and 86—Scheme of—Nature of the provisions directory or mandatory—Fa lure of auct on purchaser to deposit amount—Effect—Wrong order allowing set off to mortgagee purchaser who had not sued for or obtained a decree—Effect

The scheme of rules 72 84 85 and 86 of Order 21 of the Civil Procedure Code may be shortly stated. A decree holder cannot purchase property at the court auction in execution of his own decree without the express permission of the Court and when he does so with such permission he is entitled to a set-off but if he does so without such permission then the court has a discretion to set aside the sale upon the application by the judgment-debtor or any other person whose interests are affected by the sale (Rule 72). As a matter of pure construction this provision is obviously directory and not mandatory. The moment a person is declared to be the purchaser he is bound to deposit 25 per cent of the purchase money unless he happens to be the decree-holder in which case the court may not require him to do so (Rule 84). The proviso regarding the deposit of 25 per cent by the purchaser other than the decree holder is mandatory as the language of the rule suggests. The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree holder is entitled to the advantage of a set off. The provision for payment is however mandatory (Rule 85). If the payment is not made within the period of fifteen days the court has the discretion to forfeit the deposit and there the discretion ends but the obligation of the Court to resell the property is imperative. A further consequence of non payment is that the defaulting purchaser forfeits all claim to the property (Rule 86).

In execution of a decree certain items of properties sold subject to a previous mortgage were purchased by the mortgagees (who had filed no suit and obtained no decree to recover the money due on the mortgage). On the date of sale the mortgagees applied for a set-off stating that the purchase price was Rs 53 510 while the amount due to the mortgagees was Rs 1 20 000. The court without applying its mind to the question passed the order allowing set-off. The claim was obviously not admissible under the provisions of rule 84 which applies only to the decree holder.

In the circumstances *held*—The mortgagees misled the court into passing a wrong order allowing set-off while they knew perfectly well that they had got no decree on foot of the mortgage and their claim was undetermined. There was default in depositing the 25 per cent. of the purchase money and further there was no payment of the full amount of the purchase money within fifteen days from the date of sale.

Both the deposit and the payment of purchase money being mandatory under the combined effect of rules 84 and 85 of Order 21, Civil Procedure Code, the Court has the discretion to forfeit the deposit but it was bound to re-sell the property with the result that on default the purchaser forfeited all claim to the property. There being no sale within the contemplation of the rules there can be no question of material irregularity in the conduct of the sale. The sale is a nullity and the purchaser acquired no rights at all.

[Case 12 examined]

Appeal by Special Leave granted by the Supreme Court of India by its Order dated the 5th March 1951, from the Judgment and Decree dated the 28th January 1949, of the High Court of Judicature at Bombay in Appeal from Order No 43 of 1947, arising out of the Order dated the 14th April, 1947 of the Court of the Joint First Class Sub-Judge at Ahmedabad in Darkhast No 249 of 1940.

The Appellant No 1 in person for self and co-Appellants

C A Daphtry, Solicitor General for India (J B Dadachany and A C Dave Advocates, with him) for Respondent No 1

The Judgment of the Court was delivered by

Ghulam Hasan, J—This appeal brought by the auction-purchasers by special leave raises the question of the validity of a sale of certain properties which took place on 13th August, 1942. The respondents are the judgment-debtor and the legal representative of the deceased decree holder.

The decree-holder applied on 30th March, 1940, for execution of his decree by sale of 4 lots of property belonging to the judgment-debtor. The properties were valued at Rs. 1,50,000 and were subject to a previous mortgage of Rs. 60,000 existing in favour of the auction purchasers. It appears that under the terms of the mortgage-deed the mortgagees were entitled to proceed in the first instance against the first 3 lots and against the fourth lot only in the event of a deficiency in sale price to cover the decretal amount. The first 3 lots with which alone we are concerned in the appeal were sold to the mortgagees for Rs. 53,510 on 13th August 1942. They were sold free from the encumbrance under the order of the Court passed at the instance of the decree-holder and the mortgagees but without notice to the judgment debtor. It may, however, be noted that on the application of certain third parties their right of annuity over the properties sought to be sold was notified in the same proclamation. On the same date the mortgagees applied for a set off stating that the purchase price was Rs. 53,510 while the amount due to them was Rs. 1,20,000. The Court allowed the set-off then and there. It is important to bear in mind that the mortgagees had filed no suit and obtained no decree to recover the money due on the mortgage.

The order notifying the claim to annuity was challenged by the judgment-debtor in revision to the High Court but it was dismissed on 10th November, 1943, by Sen, J. who observed that as the sale had already taken place, the proper remedy of the judgment-debtor was to move the Court for setting aside the sale. Thereupon the judgment debtor applied on 20th November, 1943, under Order 21, rule 90 of the Civil Procedure Code, to have the sale set aside (Exhibit 51). Allegations imputing fraud and collusion to the mortgagees were made in the application in particular it was alleged that the 3 lots were purchased at a grossly inadequate price by under valuing them in the proclamation and that the mortgagees not having paid 25% of the bid the sale should not have been sanctioned in their favour. While this application was pending, the judgment debtor made another application on 15th January, 1947, challenging the sale as a nullity on the ground that the purchaser had neither made the deposit required under rule 84 of Order 21, nor paid the balance of the purchase-price as required by rule 86, and praying for resale of the property to realise the price. The order allowing set-off was attacked as being without jurisdiction. No separate order was passed on this application as the application Exhibit 51 was granted on the same grounds. The trial court found that at the time of attachment on April 30, 1940, lots Nos. 1 & 2 and lot No. 3 were valued at Rs. 40,000 each separately but at the time of proclamation of sale on 6th March, 1942, the first two were valued at Rs. 45,000 and the third at Rs. 8,000 only. The property did not consist of mere survey numbers but admittedly had bungalows, and superstructures and in the opinion of the court the subsequent valuation was bound to mislead bidders. The court, however, set aside the sale on the ground that the provisions of Order 21, rules 84 and 85 had not been complied with in that the price was not deposited but a set-off was wrongly claimed and allowed in the absence of the judgment-debtor by the court which had no authority or jurisdiction. The Court observed

"There is nothing to show that these Opponents took any permission from the Court to bid at the auction and in fact they could hardly have obtained any such permission, they being mortgagees whose dues had yet to be proved and determined. If they could ask for set-off, there is no reason why they should not be required also to seek previous permission from the Court to bid under Order 21, rule 72, of the Civil Procedure Code. It may be noted that one of these Opponents is himself a pleader and he was not justified in taking such an unauthorised order from the Court without fully acquainting with all the facts. Under all these circumstances these Opponents can with little justification avoid the consequences of non-compliance with the provisions of Order 21, rules 84 and 85, referred to above. Without proving their claim under the mortgage, they have succeeded in purchasing for a gross under value these properties and even that value they have not paid in Court by taking recourse to the device of set off.

In my opinion, there could not be a more fraudulent and materially irregular procedure than what has taken place in the present case at the instance of these mortgagees, to the great detriment and injury of the present applicant viz. the judgment-debtor."

The Court held that the application under rule 90 was barred by limitation but this being a case of a void sale and not of a mere material irregularity the Court was bound to re-sell the property irrespective of any application being made by the judgment debtor.

The High Court of Bombay (Chagla, C. J. and Gajendragadkar, J.) dismissed the appeal of the mortgagee-purchasers on the ground that the order of the trial Court was under Order 21, rule 84 and/or rule 86, Civil Procedure Code and therefore no appeal lay against such an order. The High Court held that the order of set-off was without jurisdiction and the subsequent deposit of the purchase price on December 14, 1945, made long after the period had elapsed was of no avail.

One of the auction-purchasers, who is a pleader, has himself argued the appeal before us. The principal question which falls to be considered is whether the failure to make the deposit under Order 21 rules 84 and 85 is only a material irregularity in the sale which can only be set aside under rule 90 or whether it is wholly void. It is argued that the case falls within the former category and the application under rule 90 being barred by limitation the sale cannot be set aside. It is also contended that the Court having once allowed the set off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers who would certainly have deposited the purchase price but for the mistake. We are of opinion that both the contentions are devoid of substance. In order to resolve this controversy a reference to the relevant rules of Order 21 of the Civil Procedure Code will be necessary. These rules are 72, 84, 85, and 86.

' 72 (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court bid for or purchase the property.

(2) Where a decree holder purchases with such permission, the purchase money and the amount due on the decree may subject to the provisions of section 73 be set-off against one another,

(3) Where a decree holder purchases by himself or through another person without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale,

' 84 (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under rule 72, the Court may dispense with the requirement of this rule.

"83 The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72

86 In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale be forfeited to the Government and the property shall be re-sold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold

The scheme if the rules quoted above may be shortly stated A decree-holder cannot purchase property at the court-auction in execution of his own decree without the express permission of the Court and that when he does so with such permission, he is entitled to a set off but if he does so without such permission, then the Court has a discretion to set aside the sale upon the application by the judgment-debtor, or any other person whose interests are affected by the sale (Rule 72) As a matter of pure construction this provision is obviously directory and not mandatory—See *Rai Radha Krishna and others v. Bisheshwar Sahas and others*¹ The moment a person is declared to be the purchaser, he is bound to deposit 25 per cent of the purchase money unless he happens to be the decree holder, in which case the Court may not require him to do so (Rule 84)

The provision regarding the deposit of 25 per cent by the purchaser other than the decree holder is mandatory as the language of the rule suggests The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree holder is entitled to the advantage of a set off The provision for payment is, however, mandatory (Rule 83) If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the Court to re sell the property is imperative A further consequence of non payment is that the defaulting purchaser forfeits all claim to the property (Rule 86)

It is not denied that the purchasers had not obtained any decree on foot of their mortgage and the claim of Rs 1,20,000 which they put forward before the execution Court had not been adjudicated upon or determined The mortgagees, one of whom is a Pleader, applied on the day of the sale claiming a set off on foot of the mortgage The Court without applying its mind to the question immediately passed the order allowing the set off This claim was obviously not admissible under the provisions of rule 84 which applies only to the decree holder The Court had clearly no jurisdiction to allow a set off The appellants misled the Court into passing a wrong order and obtaining the advantage of a set off while they knew perfectly well that they had got no decree on foot of the mortgage and their claim was undetermined There was default in depositing 25 per cent of the purchase money and further there was no payment of the full amount of the purchase money within fifteen days from the date of the sale Both the deposit and the purchase money being mandatory under the combined effect of subsequent provisions, the Court has the discretion to forfeit the deposit but it was bound to set aside the sale of the property with the result that on default the purchaser forfeited all claim to the property These provisions leave no doubt that unless the deposit was made as required by the mandatory provisions of the rules, the Court has no jurisdiction to pass an order allowing a set off on foot of a mortgage which had not been adjudicated upon or determined

there is no sale in the eye of law in favour of the defaulting purchaser and no right to own and possess the property accrues to him

In two cases decided by the Calcutta High Court, viz., *Munshi Md Ali Meah v Kibria Khatun*¹ and *Sm Annapurna Das v Bazley Karim Fazley Moula*² the sale was held to be no sale where the purchaser had failed to deposit the balance of the purchase money as required by rule 83. A similar view was taken by a Division Bench of the Allahabad High Court in *Nawal Kishore and Ors v Buttu Mal and Subhan Singh*³. The provisions of rule 86 were held to be mandatory in another decision of the same Court *Haji Inam Ullah v Mohammad Idris*⁴ and it was held that the court was bound to resell the property upon default irrespective of any application being made by any party to the proceedings. The case of *Bhim Singh v Sarwan Singh*⁵ was a case of failure to make a deposit as required by section 306 of the Code of 1882 (corresponding to rule 83 of the present Code). The Court treated it as a material irregularity in conducting the sale which must be enquired into upon the application under section 311 (corresponding to rule 90 of the present Code) and not by a separate suit to set aside the sale. The Court did not apply its mind to the question whether the provisions of section 306 being mandatory the sale should not be treated as a nullity for non compliance with those provisions. The decision of a single Judge (Tapp J) in *Vathu Mal v Malawa Mal and Ors*⁶ is distinguishable upon its facts. There the auction purchaser had actually tendered the money but the payment was postponed by consent of parties pending the disposal of the objection by the judgment debtor. We do not agree with the remark made in that case that the provisions of rule 83 are intended to be directory only and not absolutely mandatory. A Division Bench of the same Court (Tek Chand and Abdul Rashid JJ) held in *A R Da ar v Jhinda Ram*⁷ that the Court had no jurisdiction to extend the time for the payment of the balance of the purchase money under rule 83 and must order resale under rule 86.

Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules there can be no question of material irregularity in the conduct of the sale. Non payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to re sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold therefore that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all.

1 (1911) 15 C.W.N. 350

2 A.I.R. 1941 Cal 85

3 (1934) I.L.R. 57 All 638

4 I.L.R. (1943) All. 580 A.I.R. 1943 All

5 (1883) I.L.R. 16 Cal 33

6 A.I.R. 1931 Lah 15

7 I.L.R. (1938) Lah 97 A.I.R. 1938 Lah

It was urged before us that the court could allow a set-off in execution proceedings under its inherent powers apart from the provisions of Order 21, rule 19, of the Civil Procedure Code. We do not think that the inherent powers of the Court could be invoked to circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit. The appellants by misleading the Court want to benefit by the mistake to which they themselves contributed. They cannot be allowed to take advantage of their own wrong.

The appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —B K MUKHERJEA, VIVIAN BOSE, GHULAM HASAN AND T L VENKATARAMA AYYAR, JJ

Kiran Singh and others

*Appellants**

Chaman Paswan and others

Respondents

Suits Valuation Act (VI of 1887), section 11—Scope and effect—Court entertaining a suit or appeal over which it has no jurisdiction by reason of over-valuation or under-valuation—Effect—"Prejudice" in section 11—Meaning of

A decree passed by a Court which would have had no jurisdiction to hear a suit or appeal but for over valuation or under-valuation, is not to be treated as, what it would be but for the section, null and void, and an objection to jurisdiction based on over-valuation or under valuation, should be dealt with under section 11 of the Suits Valuation Act and not otherwise. The policy underlying sections 21 and 99, Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. The prejudice contemplated by section 11 of the Suits Valuation Act is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined.

An appellate Court has no power under section 11 of the Suits Valuation Act to consider whether the findings of fact recorded by the lower appellate Court are correct, and error in those findings cannot be held to be prejudice within the meaning of that section.

The jurisdiction that is conferred on appellate Courts under section 11 of the Suits Valuation Act is an equitable one to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate Court as a result of over-valuation or under valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not, is accordingly, a matter to be determined on the facts of each case.

Clauses (a) and (b) of section 11 of the Suits Valuation Act should be read conjunctively, notwithstanding the use of the word "or". In any event a party who has resorted to a forum of his own choice on his own valuation cannot himself be heard to complain of any prejudice. Prejudice can be a ground of relief only when it is due to the action of another party and not when it results from one's own act.

On Appeal by special leave granted by the Supreme Court by its Order, dated the 29th October 1931, from the Judgment and Decree, dated the 19th July, 1950,

of the High Court of Judicature at Patna (Sinha and Rai, JJ) in Appeal from Appellate Decree No 1152 of 1946 from the Judgment and Decree, dated the 24th day of May, 1946, of the Court of the 1st Additional District Judge in S J Title Appeal No 1 of 1946 arising out of the Judgment and Decree, dated the 27th November, 1945, of the First Court of Subordinate Judge at Monghyr in Title Suit No 34 of 1944

S C Issacs, Senior Advocate, (*Ganeshwar Prasad* and *R C Prasad*, Advocates, with him), for Appellants

B K Saran and *M M Sinha*, Advocates for Respondents Nos 1 to 9

The Judgment of the Court was delivered by

Venkatarama Ayyar, J—This appeal raises a question on the construction of section 11 of the Suits Valuation Act. The appellants instituted the suit out of which this appeal arises, in the Court of the Subordinate Judge, Monghyr, for recovery of possession of 12 acres 51 cents of land situated in mauza Bardih, of which defendants 12 and 13, forming the second party, are the proprietors. The allegations in the plaint are that on 12th April, 1943, the plaintiffs were admitted by the second party as occupancy tenants on payment of a sum of Rs 1,950 as salami and put into possession of the lands, and that thereafter the first party consisting of defendants 1 to 11 trespassed on them and carried away the crops. The suit was accordingly laid for ejecting defendants 1 to 11 and for mesne profits, past and future, and it was valued at Rs 2,950, made up of Rs 1,950 being the value of the relief for possession and Rs 1,000, being the past mesne profits claimed.

Defendants 1 to 11 contested the suit. They pleaded that they had been in possession of the lands as tenants on *batai* system, sharing the produce with the landlord, from fasli 1336 and had acquired occupancy rights in the tenements, that the second party had no right to settle them on the plaintiffs, and that the latter acquired no rights under the settlement dated 12th April, 1943. Defendants 12 and 13 remained *ex parte*.

The Subordinate Judge held, relying on certain receipts marked as Exhibits A to A-114 which were in the handwriting of the patwaris of the second party and which ranged over the period from fasli 1336 to 1347, that defendants 1 to 11 had been in possession for over 12 years as cultivating tenants and had acquired occupancy rights, and that the settlement, dated 12th April, 1943, conferred no rights on the plaintiffs. He accordingly dismissed the suit. The plaintiffs preferred an appeal against this decision to the Court of the District Judge, Monghyr, who agreed with the trial Court that the receipts, Exhibits A to A 114 were genuine, and that defendants 1 to 11 had acquired occupancy rights, and accordingly dismissed the appeal.

The plaintiffs took up the matter in second appeal to the High Court, Patna, S.A. No 1152 of 1946, and there, for the first time, an objection was taken by the Stamp Reporter to the valuation in the plaint and after enquiry, the Court determined that the correct valuation of the suit was Rs 9980. The plaintiffs paid the additional court fees required of them, and then raised the contention that on the revised valuation, the appeal from the decree of the Subordinate Judge would lie not to the District Court but to the High Court, and that accordingly S.A. No 1152 of 1946 should be heard as a First Appeal, ignoring the judgment of the District Court. The learned Judges held, following the decision of a Full Bench of that

Court in *Ramdeo Singh v Raj Narain*¹, that the appeal to the District Court was competent, and that its decision could be reversed only if the appellants could establish prejudice on the merits, and holding that on a consideration of the evidence no such prejudice had been shown, they dismissed the second appeal. The matter now comes before us on special leave.

It will be noticed that the proper Court to try the present action would be the Subordinate Court, Monghyr, whether the valuation of the suit was Rs. 2,950 as given in the plaint or Rs. 9,880 as determined by the High Court, but it will make a difference in the forum to which the appeal from its judgment would lie, whether the one valuation or the other is to be accepted as the deciding factor. On the plaint valuation, the appeal would lie to the District Court, on the valuation as determined by the High Court it is that Court that would be competent to entertain the appeal. The contention of the appellants is that as on the valuation of the suit as ultimately determined, the District Court was not competent to entertain the appeal the decree and judgment passed by that Court must be treated as a nullity, that the High Court should have accordingly heard S. A. No. 1152 of 1946 not as a Second Appeal with its limitations under section 100 Civil Procedure Code, but as a First Appeal against the judgment and decree of the Subordinate Judge, Monghyr, and that the appellants were entitled to a full hearing as well on question of fact as of law. And alternatively it is contended that even if the decree and judgment of the District Court on appeal are not to be treated as a nullity and the matter is to be dealt with under section 11 of the Suits Valuation Act, the Appellants had suffered 'prejudice' within the meaning of that section, that their appeal against the judgment of the Subordinate Judge was heard not by the High Court but by a Court of inferior jurisdiction *viz.*, the District Court of Monghyr, and that its decree was therefore liable to be set aside, and the appeal heard by the High Court on the merits, as a First Appeal.

The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judge*, and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position.

Section 11 enacts that notwithstanding anything in section 578 of the Code of Civil Procedure an objection that a Court which had no jurisdiction over a suit or appeal had exercised it by reason of over valuation or under valuation, should not be entertained by an appellate Court, except as provided in the section. Then follow provisions as to when the objections could be entertained and how they are

to be dealt with. The drafting of the section has come in—and deservedly—for considerable criticism, but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under valuation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on over valuation or under-valuation, should be dealt with under that section and not otherwise. The reference to section 578, now section 99 Civil Procedure Code, in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the Courts which passed them lacked jurisdiction as a result of over valuation or under valuation. It is with a view to avoid this result that section 11 was enacted. It provides that objections to the jurisdiction of a Court based on over valuation or under valuation shall not be entertained by an appellate Court except in the manner and to the extent mentioned in the section. It is a self contained provision complete in itself, and no objection to jurisdiction based on over valuation or under valuation can be raised otherwise than in accordance with it. With reference to objections relating to territorial jurisdiction section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying sections 21 and 99, Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court Monghyr should be treated as a nullity cannot be sustained under section 11 of the Suits Valuation Act.

On behalf of the appellants *Rajlakshmi Dasee v. Katayam Dasee*¹ and *Shidappa Venkatrao v. Bachappa Subrao*² were affirmed by the Privy Council in *Bachappa Subrao Jadhav v. Shidappa Venkatrao Jadhav*³, were relied on as supporting the contention that if the appellate Court would have had no jurisdiction to entertain the appeal if the suit had been correctly valued, a decree passed by it must be treated as a nullity. In *Rajlakshmi Dasee v. Katayam Dasee*¹, the facts were that one Katayam Dasee instituted a suit to recover the estate of her husband Jogendra, in the Court of the Subordinate Judge, Alipore, valuing the claim at Rs 2,100, whereas the estate was worth more than a lakh of rupees. The suit was decreed and the defendants preferred an appeal to the District Court, which was the proper Court to entertain the appeal on the plaint valuation. There, the parties compromised the matter, and a consent decree was passed, recognising

¹ (1910) I L.R. 38 Cal. 639

² (1912) I L.R. 36 Bom. 618

³ (1918) 36 M.L.J. 437 L.R. 46 I.A. 24
I L.R. 43 Bom. 507 (P.C.)

the title of the defendants to portions of the estate. Then Rajlakshmi Dasee, the daughter of Jogendra, filed a suit for a declaration that the consent decree to which her mother was a party was not binding on the reversioners. One of the grounds urged by her was that the suit of Katyayani was deliberately undervalued, that if it had been correctly valued, it was the High Court that would have had the competence to entertain the appeal, and that the consent decree passed by the District Judge was accordingly a nullity. In agreeing with this contention, the High Court observed that a decree passed by a Court which had no jurisdiction was a nullity, and that even consent of the parties could not cure the defect. In that case, the question was raised by a person who was not a party to the action and in a collateral proceeding, and the Court observed

"We are not now called upon to consider what the effect of such lack of jurisdiction would be upon the decree in so far as the parties thereto were concerned. It is manifest that so far as a stranger to the decree is concerned, who is interested in the property affected by the decree, he can obviously ask for a declaration that the decree is a nullity because made by a Court which had no jurisdiction over the subject matter of the litigation."

On the facts, the question of the effect of section 11 of the Suits Valuation Act did not arise for determination and was not considered.

In *Shudappa Venkatrao v. Rachappa Subrao*¹, the plaintiffs instituted a suit in the Court of the Subordinate Judge, First Class, for a declaration that he was the adopted son of one Venkatrao and for an injunction restraining the defendant from interfering with his possession of a house. The plaintiff valued the declaration at Rs. 130 and the injunction at Rs. 5, and the suit was valued for purposes of pleader's fee at Rs. 69,016-9-0 being the value of the estate. The suit was decreed by the Subordinate Judge, and against his decree, the defendant preferred an appeal to the District Court which allowed the appeal and dismissed the suit. The plaintiff took up the matter in second appeal to the High Court, and contended that on the valuation in the plaint that appeal against the decree of the Subordinate Judge lay to the High Court and that the appeal to the District Court was incompetent. This contention was upheld, and the decree of the District Judge was set aside. It will be seen that the point in dispute was whether on the allegations in the plaint the value for purposes of jurisdiction was Rs. 135 or Rs. 69,016-9-0, and the decision was that it was the latter. No question of over-valuation or under-valuation arose, and no decision on the scope of section 11 of the Suits Valuation Act was given.

As a result of its decision the High Court came to entertain the matter as a first appeal and affirmed the decree of the Subordinate Judge. The defendant then took up the matter in appeal to the Privy Council in *Rachappa Subrao Jadhav v. Shudappa Venkatrao Jadhav*² and there, his contention was that, in fact, on its true valuation the suit was triable by the Court of the Subordinate Judge of the Second Class, and that the District Court was the proper Court to entertain the appeal. The Privy Council held that this objection which was "the most technical of technicalities" was not taken in the Court of First Instance, and that the Court would not be justified "in assisting an objection of that type", and that it was also untenable. Before concluding, it observed

The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. The defendant in this suit seeks

1 (1912) I.L.R. 36 Bom. 628

I.L.R. 43 Bom. 50 (P.C.)

2 (1918) 35 M.L.J. 437 L.R. 46 I.A. 24

affected the disposal of the suit or appeal on its merits" would become wholly useless. These words clearly show that the decree passed in such cases are liable to be interfered with in an appellate Court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And the prejudice envisaged by that section therefore must be something other than the appeal being heard in a different forum. A contrary conclusion will lead to the surprising result that the section was enacted with the object of curing defects of jurisdiction arising by reason of over valuation or under valuation, but that, in fact, this object has not been achieved. We are therefore clearly of opinion that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to bear it on a correct valuation of the suit as ultimately determined.

It is next argued that in the view that the decree of the lower appellate Court is liable to be reversed only on proof of prejudice on the merits, the second appellate Court must for the purpose of ascertaining whether there was prejudice, hear the appeal fully on the facts, and that in effect, it should be heard as a first appeal. Reliance is placed in support of this contention on the observations of two of the learned Judges in *Ramdeo Singh v. Raj Narain*¹. There, Sinha, J., observed that though the second appeal could not be treated as a first appeal prejudice could be established by going into the merits of the decision both on questions of fact and of law and that that could be done under section 103 Civil Procedure Code. Meredith J., agreed that for determining whether there was prejudice or not, there must be an enquiry on the merits of the decision on questions of fact, but he was of opinion that that could be done under section 11 of the Suits Valuation Act itself. Das, J., however, declined to express any opinion on this point, as it did not arise at that stage. The complaint of the appellants is that the learned Judges who heard the second appeal, though they purported to follow the decision in *Ramdeo Singh v. Raj Narain*¹ did not, in fact, do so, and that there was no consideration of the evidence bearing on the questions of fact on which the parties were in dispute.

That brings us to the question as to what is meant by 'prejudice' in section 11 of the Suits Valuation Act. Does it include errors in findings on questions of fact in issue between the parties? If it does, then it will be obligatory on the Court hearing the second appeal to examine the evidence in full and decide whether the conclusions reached by the lower appellate Court are right. If it agrees with those findings, then it will affirm the judgment, if it does not, it will reverse it. That means that the Court of second appeal is virtually in the position of a Court of first appeal. The language of section 11 of the Suits Valuation Act is plainly against such a view. It provides that over valuation or under valuation must have prejudicially affected the disposal of the case on the merits. The prejudice on the merits must be directly attributable to over valuation or under valuation, and an error in a finding of fact reached on a consideration of the evidence cannot possibly be said to have been caused by over valuation or under valuation. Mere errors in the conclusions on the points for determination would therefore be clearly precluded by the language of the section. It must further be noted that there is no provision in the Civil Procedure Code, which authorises a Court of second appeal to go into questions of fact on which the lower appellate Court has recorded findings and to reverse them. Section 103 was relied on in *Ramdeo Singh v. Raj Narain*¹

as conferring such a power. But that section applies only when the lower appellate Court has failed to record a finding on any issue or when there had been irregularities or defects such as fall under section 100, Civil Procedure Code. If these conditions exist, the judgment under appeal is liable to be set aside in the exercise of the normal powers of a Court of second appeal without resort to section 11 of the Suits Valuation Act. If they do not exist, there is no other power under the Civil Procedure Code authorising the Court of second appeal to set aside findings of fact and to re-hear the appeal itself on those questions. We must accordingly hold that an appellate Court has no power under section 11 of the Suits Valuation Act to consider whether the findings of fact recorded by the lower appellate Court are correct, and that error in those findings cannot be held to be prejudice within the meaning of that section.

So far, the definition of "prejudice" has been negative in terms—that it cannot be mere change of forum or mere error in the decision on the merits. What then is positively prejudice for the purpose of section 11? That is a question which has agitated Courts in India ever since the enactment of the section. It has been suggested that if there was no proper hearing of the suit or appeal and that had resulted in injustice, that would be prejudice within section 11 of the Suits Valuation Act. Another instance of prejudice is when a suit which ought to have been filed as an original suit is filed as a result of under valuation on the small cause side. The procedure for trial of suits in the Small Cause Court is summary, there are no provisions for discovery or inspection, evidence is not recorded *in extenso*, and there is no right of appeal against its decision. The defendant thus loses the benefit of an elaborate procedure and a right of appeal which he would have had, if the suit had been filed on the original side. It can be said in such a case that the disposal of the suit by the Court of Small Causes has prejudicially affected the merits of the case. No purpose, however, is served by attempting to enumerate exhaustively all possible cases of prejudice which might come under section 11 of the Suits Valuation Act. The jurisdiction that is conferred on appellate Courts under that section is an equitable one to be exercised when there has been an erroneous assumption of jurisdiction by a Subordinate Court as a result of over-valuation or under valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not, is accordingly, a matter to be determined on the facts of each case.

We have now to see whether the appellants have suffered any prejudice by reason of the under valuation. They were the plaintiffs in the action. They valued the suit at Rs 2950. The defendants raised no objection to the jurisdiction of the Court at any time. When the plaintiffs lost the suit after an elaborate trial, it is they who appealed to the District Court as they were bound to on their valuation. Even there, the defendants took no objection to the jurisdiction of the District Court to hear the appeal. When the decision went on the merits against the plaintiffs, they preferred S A No 1152 of 1946 to the High Court of Patna, and if the Stamp Reporter had not raised the objection to the valuation and to the court fee paid, the plaintiff would not have challenged the jurisdiction of the District Court to hear the appeal. It would be an unfortunate state of the

law, if the plaintiffs who initiated proceedings in a Court of their own choice could subsequently turn round and question its jurisdiction on the ground of an error in valuation which was their own. If the law were that the decree of a Court which would have had no jurisdiction over the suit or appeal but for the over valuation or under valuation, should be treated as a nullity, then of course they would not be estopped from setting up want of jurisdiction in the Court by the fact of their having themselves invoked it. That, however, is not the position under section 11 of the Suits Valuation Act. Why then should the plaintiffs be allowed to resile from the position taken up by them to the prejudice of their opponents who had acquiesced therein?

There is considerable authority in the Indian Courts that clauses (a) and (b) of section 11 of the Suits Valuation Act should be read conjunctively, notwithstanding the use of the word "or". If that is the correct interpretation the plaintiffs would be precluded from raising the objection about jurisdiction in an appellate Court. But even if the two provisions are to be construed disjunctively and the parties held entitled under section 11 (1) (b) to raise the objection for the first time in the appellate Court even then, the requirement as to prejudice has to be satisfied, and the party who has resorted to a forum of his own choice, on his own valuation cannot himself be heard to complain of any prejudice. Prejudice can be a ground for relief only when it is due to the action of another party and not when it results from one's own act. Courts cannot recognise that a prejudice which flows from the action of the very party who complains about it. Even apart from this we are satisfied that no prejudice was caused to the appellants by their appeal having been heard by the District Court. There was a fair and full hearing of the appeal by that Court, it gave its decision on the merits on a consideration of the entire evidence in the case, and no injustice is shown to have resulted in its disposal of the matter. The decision of the learned Judges that there were no grounds for interference under section 11 of the Suits Valuation Act is correct.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —S R DAS N H BHAGWATI AND B JAGANNADHADAS, JJ

The Commissioner of Income Tax, Bombay South Bombay *Appellants**

v

Messrs Ogale Glass Works, Ltd, Ogale Wadi

Respondents

Income-tax Act (XI of 1922) section 4 (1) (a)—Assessee non-resident company supplying goods within British India—Posting of cheques in British India and receipt of cheques outside—If income received within British India so as to be liable to assessment of income tax—Cheque—How far payment

The assessee a non-resident company was carrying on business in Aundh (then an Indian State outside British India) of manufacturing lanterns and other glassware. In the relevant accounting years 1940-1941 to 1944-1945 the assessee secured some contracts for the supply of lanterns and other glasswares to the Government of India. The price of the goods supplied under the contracts were paid by cheques drawn on the Reserve Bank of India Bombay. The cheques used to be received by the assessee in Aundh and cashed through its bank at Bombay. The assessee being a non-resident company its liability to British India income tax depended upon its receipt of income within

British India. On the question whether the amounts under the cheques were received within British India or in the Aundh State where the cheques were received,

Held A cheque unless dishonoured, is payment. Delivery of the cheque to the post office at the request of the addressee is a delivery to him as by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance. The posting of the cheques in Delhi in the instant case in law amounted to payment in Delhi to the assessee and accordingly the income was received in British India within the meaning of section 4 (1) (a) of the Income tax Act.

On Appeal from the Judgment and Order, dated the 17th day of September, 1951, of the High Court of Judicature at Bombay (Chagla, C J and Tendolkar, J) in Income-Tax Reference No. 19 of 1949

M C Setalvad, Attorney-General for India and *C K Daphtary*, Solicitor-General for India (*Porus A Mehta*, Advocate, with them), for Appellant

R. J. Kolah, *T D Pandit* and *Rajinder Narain*, Advocates for Respondents

The Judgment of the Court was delivered by

Das, J—This appeal arises out of proceedings for the assessment to income-tax of the respondent Messrs Ogale Glass Works, Ltd (hereinafter referred to as "the assessee") for the five assessment years 1941-42 to 1945-46

The assessee is a Limited Liability Company, incorporated and carrying on business in Aundh which in those days was an Indian State outside British India. It was accordingly a non resident Company for the purposes of the Indian Income-Tax Act.

The assessee manufactures lanterns and other glasswares at its Works in Aundh State. In the relevant accounting years the assessee secured some contracts for the supply of lanterns and other glasswares to the Government of India. The price of the goods supplied under the contracts were paid by cheques drawn on the Reserve Bank of India, Bombay. The cheques used to be received by the assessee in Aundh and cashed through its bank at Bombay as hereinafter stated.

The assessee being a non resident Company its liability to British Indian income-tax depended upon its receipt of income within British India. In the course of proceedings for the assessment of the assessee to income tax for the five years mentioned above, the assessee contended that its profits on the sales accrued and were received in the Aundh State where it received payment by the receipt of the cheques. The Income Tax Officer and, on appeal, the Appellate Assistant Commissioner held that the assessee received income, profits or gains in British India inasmuch as the cheques were drawn on a Bank in Bombay and had been cashed in Bombay and accordingly taxed the assessee under section 4 (1) (a) of the Indian Income-Tax Act. On appeal by the assessee the Income-Tax Appellate Tribunal upheld the assessment.

Being aggrieved by the order of the Tribunal the assessee applied for a reference of the case to the High Court for the determination of the question of law which arose out of the Tribunal's Order and the Tribunal agreeing that a question of law did arise out of its order referred the following question to the High Court along with a statement of the case

"Whether on the facts of the case income profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4 (1) (a) of the Act."

At the hearing of the reference by the High Court learned advocate for the assessee contended, *inter alia*, that the cheques were received by the assessee in full

satisfaction of the debt due to it by the Government of India and that the debt of the Government of India had been discharged by the acceptance of the cheques by the assessee in Aundh. The High Court felt that in order to determine this contention it would be necessary for the Tribunal to find certain further facts and accordingly the High Court remanded the reference back to the Tribunal with a request to submit a Supplementary Statement of the case on the lines indicated in the order dated the 15th September, 1949. The Tribunal submitted a Supplementary Statement of the case on the 8th June, 1951.

In the Supplementary Statement of the case reference is made to clause 15 of the conditions of the contract governing supplies made by the assessee to the Government of India. The system of payment under that clause was that 90 per cent of the price of each consignment would be paid on proof of despatch of the stores from a Railway Station or Port in India after inspection and the balance of 10 per cent would be paid on receipt of the consignment in good condition. That clause also provided

Unless otherwise agreed between the parties payment for the delivery of the Stores will be made on submission of bills in the prescribed form in accordance with instructions given in the Acceptance of Tender by cheque on a Government Treasury in India or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business.

The assessee used to submit bills in prescribed form and on the form used to write

Kindly remit the amount by a cheque in our favour on any Bank in Bombay

After the submission of the bills the assessee used to receive from the Government cheques drawn on the Bombay branch of the Reserve Bank of India along with a memo stating

The undersigned has the honour to forward herewith cheque No. dated in payment of the bills noted below —

Then followed a tabular statement setting out the number, date and amount of the cheques. On the top of the memo there was a direction that it—

be immediately returned to the Controller of Supply Accounts with the acknowledgment form on the reverse duly signed and stamped when necessary

The acknowledgment form was thus expressed

“The undersigned has the honour to acknowledge cheque No. dated for Rs. in payment of the bills noted in the first column on the reverse

After receipt of the cheques the assessee used to indorse it in favour of Aundh Bank, Ltd. Ogalewadi Branch which in its turn used to endorse them in favour of the Bombay Provincial Co-operative Bank, Ltd., Bombay. The last-named bank cleared the cheques through the Clearing House in Bombay. The Supplementary Statement of the case further records that the Aundh Bank, Ltd., used to credit the assessee's account on the very day the cheques were received from the assessee with the amount of the cheque less the collection charges and that the assessee used to credit the account of the Supply Department and make corresponding debits to the Bank's account and the Bank charges account. A case was sought to be made by the learned advocate for the assessee before the Tribunal that the cheques used to be discounted by the Aundh Bank, Ltd., presumably implying thereby that the assessee actually got payment in cash in Aundh. This case was repelled by the Tribunal which held that the Bank only allowed the assessee to draw money on the security of the cheques but did not discount them. Our

attention has been drawn to the following passage in paragraph 8 of the Supplementary Statement of the case :

"By merely issuing a cheque to the assessee no payment as such was made by the Government. The payment was only made when the Government's account in the books of the Bank was debited."

Paragraph 9 of the Supplementary Statement of the case thus summarises the Tribunal's findings :

"9 On the above facts our findings are

(1) Under the agreement with the Government of India the assessee had undertaken to receive the payment by cheque drawn on a Bank in India.

(2) The assessee company made a specific request to the Government to make payment of the sale proceeds by cheque drawn on a bank in Bombay

(3) When the assessee received the cheque, it did not receive the sale proceeds, it received the sale proceeds subject to the encashment of the cheque

(4) The assessee's bankers allowed the assessee to draw money against the security of the cheque on the very day the cheque was sent for collection to the bank.

(5) The assessee's bankers realised the payment of the cheque from the Reserve Bank of India, Bombay, as agents of the assessee. For rendering this service the bank charged the usual commission charged for collecting an outstation cheque

(6) The sale proceeds were received in Bombay

(7) The cheque was encashed on behalf of the assessee at Bombay

(8) The profits on the sales made to the Government of India were received by the assessee in cash in Bombay"

The Supplementary Statement of the case concludes with the remark that both parties agreed to the correctness of the facts

The main argument advanced before us, as before the High Court, by the learned advocate for the assessee is that the assessee received payment for the goods supplied by it when it received the cheques at Aundh. In other words the assessee accepted the cheques in full satisfaction and in discharge of its claim against the Government under the contracts. The conclusion pressed upon us is that as the cheques were received at Aundh the payment was received there and consequently the assessee which is a non-resident Company did not receive any income, profits or gains in British India within the meaning of section 4 (1) (a) of the Indian Income-Tax Act and the referred question should be answered in the negative

The contention put forward by the Revenue is two-fold. In the first place it is urged that the question whether the assessee accepted the cheques unconditionally and in full satisfaction of its claims under the contracts is concluded by the Tribunal's findings of facts. This contention is not wholly without force. The passage from paragraph 8 of the Supplementary Statement of the case and sub-paragraphs 3, 6 and 8 of paragraph 9 do tend to suggest that in the view of the Tribunal no payment was made by the Government by merely issuing the cheques, that when the assessee received the cheques it did not receive the sale proceeds, that it received the sale proceeds subject to the encashment of the cheques, that the Bank collected the cheques in Bombay as the agent of the assessee and that the sale proceeds were, therefore, received in cash in Bombay. But in view of the language used in the Supplementary Statement of the case there is ample scope for the view that the portions referred to above do not amount to findings of fact by the Tribunal but, on the contrary, are only inferences drawn by it from facts found by it. Indeed the High Court was of the opinion that the Tribunal had not in terms come to a finding of fact that the assessee accepted the cheques in com-

plete discharge of its claim for the price of goods supplied by it but on a consideration of the facts actually found by the Tribunal the High Court came to the conclusion that the necessary inference to be drawn from those facts was that there was an arrangement between the assessee and the Government from which it could be said that the acceptance by the assessee of the cheques from the Government resulted in an unconditional discharge of the debt. In the circumstances we have to examine the facts found by the Tribunal which have a bearing on this point.

The assessee contends that on the facts found by the Tribunal it must be held that it received the cheques in full and unconditional discharge of its claims for the price of goods sold and delivered by it to the Government and not conditionally subject to realisation. That a sum of money may be received in more ways than one cannot be doubted. It may be received by the transfer of coins or currency notes or a negotiable instrument which represents and produces cash and is treated as such by businessmen. (See per Lord Lindley in *Gresham Life Assurance Society v Bushop*¹. Reference in this connection may also be made to the decisions in *Commissioner of Income tax v Kameshwar Singh*², *Raghunandan Prasad v Commissioner of Income-tax*³ and *Commissioner of Income tax v Maheswari Saran Singh*⁴. Learned Solicitor General does not dispute this proposition but he argues that, in the absence of any agreement express or implied, to the contrary, a payment by a negotiable instrument is always understood to be conditional. He refers us to Benjamin on 'Sale,' 8th Edition, p. 787 in support of the proposition that the intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken 'in payment' for the goods (*Stedman v Gooch*⁵ and *Millard v Duke of Argyll*⁶), or 'in discharge' (*Kemp v Wall*⁷, or in settlement of the price (*Re Rouer and Haslam*⁸). In addition to the above English cases referred to in Benjamin on 'Sale' the learned Solicitor General also relies on the case of *Palamappa Chetty v Arunachalam Chetty*⁹ where it was held by the Madras High Court that the execution of a formal receipt for the amount covered by the bill of exchange or hundi was not sufficient to rebut the general presumption that the delivery of a bill of exchange or a hundi for a debt operated only as a conditional discharge of the debt. He insists that on the facts of this case there is nothing from which an agreement may be implied that the cheques were given and received unconditionally in full discharge of the original contractual liability of the Government for the price of the goods supplied by the assessee. Sri Kolah, on the other hand, relied on the following facts in answer to the contentions of the learned Solicitor General

- (i) that there was an arrangement by the contract itself for payment by cheque (clause 15);
- (ii) that in the bills submitted by him the assessee expressly asked for payment by cheque,
- (iii) that the Government sent cheques in payment of the bills,
- (iv) that on receipt of the cheques the assessee returned the acknowledgement form duly signed and stamped as a formal receipt
- (v) that the drawer of the cheques was the Government of India and the drawee was the Reserve Bank of India for whose solvency there could be no apprehension at all in the mind of the assessee.

1 L.R. (1902) A.C. 287 at 296
 2 (1933) 1 I.T.R. 107
 3 (1933) 64 M.L.J. 544 L.R. 60 I.A. 133
 I.L.R. 12 Pat 303 (P.C.)
 4 (1931) 19 I.T.R. 83

5 (1793) 1 Esp. 5
 6 (1843) 6 M. & G. 40
 7 (1846) 15 M. & W. 672
 8 L.R. (1893) 2 Q.B. 286
 9 (1911) 21 M.L.J. 437

Sri Kolah contends that the cumulative effect of these facts is clearly enough to establish that the cheques were received unconditionally as payment. Learned Solicitor-General points out that the assessee's request to pay the amount of the bills by cheques carries the matter no further, for the undertaking to pay by cheque was already there. The point of the request was that the cheques should be issued on some Bank in Bombay. The insistence on a stamped receipt in advance of payment was, says the Solicitor General, in keeping with the usual practice of Government departments. Therefore, we have in this case, according to the learned Solicitor General, nothing more than a term in the contract for payment by cheques and the status of the drawer and drawee of the cheques. These two circumstances, so submits the Solicitor General, are not sufficient to establish the fact of the acceptance of the cheques as unconditional discharge. He contends that in the absence of an express agreement it is only when the creditor elects to take a bill or cheque having it in his power to obtain payment in cash that is to say takes a bill or cheque by choice or preference instead of cash that an agreement may be implied that he took it as an unconditional and absolute payment of the debt (*Robinson v Henry Reid*¹ and *Anderson v Hillies*²). Such cases must be rare for the creditor is not ordinarily likely to give up the advantage of having a double remedy, namely one on the bill or cheque and the other on dishonour of the bill or cheque on the original cause of action. He points out that in this case there is no finding of any special agreement in this behalf and therefore, submits the learned Solicitor General the assessee must be taken to have received the cheques conditionally i.e. subject to realisation. The learned Solicitor-General concludes that, in the circumstances no payment was received by the mere receipt of the cheques and that payment was received only when the cheques were cashed in Bombay and that such receipts in Bombay became immediately assessable to British Indian Tax under section 4 (1) (a). The High Court repelled this line of argument and held that the assessee received payment on the dates the cheques were delivered to it. We find ourselves substantially in agreement with this conclusion. It is to be remembered that there are four modes in which a contract may be discharged namely (1) by agreement (2) by performance (3) by being excused by law from performing it and (4) by breach. In this case clause 15 of the contract provides how the payment of the price is to be made. In short the contract itself, by that clause, prescribes the manner and the time for performance by the Government of its part of the contract and as the Government made the payments in the prescribed manner, i.e. by cheques, it fulfilled its engagement and such payment would under section 50 of the Indian Contract Act, operate as a discharge of the contract. It should also be remembered that the assessee sent his formal stamped receipts only after the receipt of the cheques and not along with the bills submitted by it. Therefore, the receipts cannot be regarded as having been sent in advance. The status of the drawer and the drawee of the cheques is also a material consideration. Finally there is no suggestion that any of the cheques was dishonoured on presentation. We, therefore, agree with Sri Kolah that the several facts relied on by him and alluded to above, taken cumulatively, must lead us to the conclusion that the cheques were received in complete discharge of the claim for the price of the goods.

Learned Solicitor General, however, contends, on the authority of the decision in *Kodarmal v Sagormal*¹, that the request by the creditor to send a cheque does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time. Even if we accept his contention that the facts referred to above are not sufficient to raise the implication that the cheques were accepted as payment and even if the sending of the cheques in terms of clause 15 or at the special request of the assessee did not operate as an unconditional discharge of the Government's liability even then the assessee's position will be no better. When it is said that a payment by negotiable instrument is a conditional payment what is meant is that such payment is subject to a condition subsequent that if the negotiable instrument is dishonoured on presentation the creditor may consider it as waste paper and resort to his original demand (*Stedman v Gooch*²). It is said in Benjamin on Sale, 8th edition, page 788 —

The payment takes effect from the delivery of the bill but is defeated by the happening of the condition i.e. non payment at maturity

In Byles on Bills 20th edition page 23 the position is summarised pithily as follows

A cheque unless dishonoured is payment

To the same effect are the passages to be found in Hart on Banking, 4th edition, Volume I, page 342. In *Felix Hadley & Co v Hadley*³, Byrne, J, expressed the same idea in the following passage in his judgment at page 682

In this case I think what took place amounted to a conditional payment of the debt, the condition being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view then I think the position is exactly as if an agreement had been expressly made that the bill or cheque should operate as payment unless defeated by dishonour or by not being met, and I think that that agreement is implied from giving and taking the cheques and bills in question.

The following observations of Lord Maugham in *Rhokana Corporation v Inland Revenue Commissioners*⁴, are also apposite

'Apart from the express terms of section 33 sub-section 1 a similar conclusion might be founded on the well known common law rules as to the effect of the sending of a cheque in payment of a debt, and in the fact that though the payment is subject to the condition subsequent that the cheque must be met on presentation the date of payment if the cheque is duly met is the date when the cheque was posted.

In the case before us none of the cheques has been dishonoured on presentation and payment cannot therefore be said to have been defeated by the happening of the condition subsequent namely dishonour by non payment and that being so there can be no question therefore that the assessee did not receive payment by the receipt of the cheques. The position, therefore, is that in one view of the matter there was in the circumstances of this case, an implied agreement under which the cheques were accepted unconditionally as payment and on another view, even if the cheques were taken conditionally, the cheques not having been dishonoured but having been cashed the payment related back to the dates of the receipt of the cheques and in law the dates of payments were the dates of the delivery of the cheques.

On the footing then that the assessee received payment as soon as the cheques were delivered to it the question still remains as to when and where the assessee

1 (1907) 9 Bom LR 903 at 911

2 (1793) 1 Esp 5

3 LR (1898) 2 Ch D 620

4 LR (1938) A.C. 380 at 300

received such payment. The answer is obvious, says the assessee, namely, that it received payment in Aundh where the cheques were delivered to it. The learned Solicitor General, however, contests that argument. According to him the cheques were delivered to the assessee as soon as they were posted. The rejoinder of the assessee is two fold. In the first place it is said that this is an entirely new question of law which was never raised or argued before the Tribunal and was not dealt with by it and, therefore, cannot be said to arise out of the Tribunal's Order and consequently the Court has no jurisdiction, while exercising its advisory jurisdiction under section 66 of the Indian Income Tax Act, to permit such a new question of law to be raised at this stage. Learned Counsel for the assessee relies on the cases of *Commissioner of Excess Profits Tax, West Bengal v. Jeewanlal, Ltd.*¹, *Chainrup Sampatram v. Commissioner of Income Tax, West Bengal*², *Allahabad Bank, Ltd. v. Commissioner of Income Tax, West Bengal*³, *Mohan Lal Hirralal v. Commissioner of Income Tax, C.P. and Berar*⁴ and *Hira Mills, Ltd., Cawnpore v. Income Tax Officer, Cawnpore*⁵, while the learned Solicitor General refers us to the decision in *Madan Lal Dharmadharka v. Commissioner of Income Tax, Bombay City*⁶ and *Commissioner of Income-Tax, Delhi v. Punjab National Bank, Ltd.*⁷. In the view we have taken it is not necessary for us, on this occasion, to express any opinion on the larger question as to the scope, meaning and import of the words "any question of law arising out of" the Tribunal's Order on the interpretation of which there exists a wide divergence of judicial opinion. It should be noted that this is not a case where the Tribunal having refused to refer a question of law an application was made to the High Court to exercise its jurisdiction under sub section (2) of section 66. Here the Tribunal in exercise of its powers under sub section (1) of that section did refer a question of law to the High Court. Nobody at any time contended and even now it is not suggested before us that the question of law referred to the High Court did not arise out of the Tribunal's Order or had not been properly referred to the High Court. A question of law arising out of its order having thus been properly referred by the Tribunal under sub section (1) the High Court had to deal with and answer it in exercise of its jurisdiction under sub section (5). In support of its contention that the question should be answered in the affirmative the Revenue advanced the argument, based on certain facts, that the cheques had been accepted only conditionally and, therefore, there was no payment until the cheques had been cashed and the cheques having been cashed in Bombay the payment must be regarded as having been received in Bombay. That argument did not find favour with the High Court and that being the position the Revenue sought to raise before the High Court, as it does before us, an alternative argument, also based on facts, that the cheques having at the request of the assessee, been posted at Delhi, the mere posting of the cheques in such circumstances operated as payment in Delhi. Here no new question of law is sought to be raised. The question of law still is whether on the facts of this case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4 (1) (a) of the Act. The argument is that as the cheques were posted at Delhi at the request of the assessee payment was received by it in

1 (1951) 20 I.T.R. 39 at 47

2 (1951) 20 I.T.R. 484 at 493-496

3 (1952) 21 I.T.R. 169

4 (1952) 22 I.T.R. 448

5 (1946) 14 I.T.R. 417

6 (1948) 16 I.T.R. 227 at 232

7 (1952) 21 I.T.R. 526

British India. It is said that although the language in which the question has been framed is wide enough to include this branch of the argument, the question should, nevertheless, be read as circumscribed by the facts on which the Tribunal's decision was made and should not be regarded as at large. This suggestion means that the question must be read as limited only to those facts on which alone reliance was placed in support of the argument actually advanced before the Tribunal and on which the Tribunal's decision was founded, leaving out all other facts appearing on the record and even referred to in the Tribunal's Order and the Statements of the case. There is no warrant for such suggestion. The language of the question clearly indicates that the question of law has to be determined 'on the facts of this case'. To accede to the contention of the assessee will involve the undue cutting down of the scope of the question by altering its language. Seeing that the High Court permitted this argument to be advanced before them we are not prepared to shut it out.

Sri Kolah then contends that the requisite facts on which this branch of the argument may be based are not to be found in the Order of the Tribunal and the statements of the case and therefore this argument should not be entertained. There would have been considerable force in this contention if the facts necessary to support the new argument advanced by the Revenue were not on the record. But such is not the case here as will be presently shown. The High Court conceded that if the assessee had requested the Government to send the cheques by post then it would have made the post office its agent and in that event the posting of the cheques by the Government at Delhi would have been delivery of the cheques to the assessee in Delhi. The High Court, however, held that there was no finding by the Tribunal that in point of fact the assessee had ever requested the Government to send the cheques by post and that that being the position it could not be said that the cheques had been delivered to the assessee in Delhi. In our opinion, for reasons to be presently stated this part of the decision of the High Court cannot be supported on facts and its conclusion cannot be sustained in law.

Turning to the Order of the Tribunal we find the following passages:

All payments for the goods supplied were made by cheques drawn by the Government department at Delhi on the Reserve Bank of India Bombay Branch. The cheques were received by the assessee Company in its office in Aundh State.

The finding of fact recorded in the first statement of the case also comprises the following (*inter alia*)

These cheques were received by the assessee Company at its office in Aundh State by post. The finding of fact in paragraph 3 of the Supplementary Statement of the case is thus recorded:

' 3. The assessee Company used to submit the bills and on the form of the bill it used to write "kindly remit the amount by a cheque in our favour on any bank in Bombay."

The question for our consideration is as to what, on the legal principles laid down in judicial decisions, these findings of fact amount to.

In *Norman v. Ruckels*¹, the creditor carrying on business as milliner in Bond Street wrote to one of the customers who resided in Suffolk saying "the favour of a cheque within a week will oblige." The customer upon such request sent a cheque for the amount by post. The cheque was stolen in the transit and was paid by the

Bank to the thief. It will be noted that there was no express request to send the cheque by post, but nevertheless it was held that the sending of the cheque by post was payment. On appeal the Court of appeal upheld the trial Court and observed

"An express request to send through the post was not necessary. If what the plaintiffs said amounted to a request to send the cheque by the post, then there was payment. To answer that question the existing circumstances must be looked at. A milliner in London wrote to a lady in Suffolk asking for a cheque. Did that letter reasonably lead the lady to suppose and did she suppose that she might send the cheque by post? She could not suppose that she was to send a messenger with it or come up to London herself. The only reasonable and proper meaning to be attached to it whatever Madame Phillipe might have intended was that she was to send the cheque by post. She therefore, reasonably believed that she was invited to send her cheque by post and she did what she was asked to do. Consequently what she did amounted to payment.

In *Tharluall v. The Great Northern Railway Co*¹, the directors by their Report recommended (a) the declaration of dividend at certain rates and (b) the despatch of dividend warrants by post. At the half yearly general meeting the Shareholders passed a resolution that dividends be declared at certain altered rates but said nothing about sending the same by post. Dividend warrants were sent to a stockholder by post but it was lost in the post. *Bray J.* held that in the circumstances there was a request by the Stockholder to the Company to pay the amount due to him by means of a warrant sent by post. The case of *Badische Anilin und Soda Fabrik v. Basle Chemical Works*² was concerned with a Swiss seller who was asked to send the goods by post to England which he did. The goods were manufactured according to an invention protected by an English Patent. The question was as to who brought the goods to England so as to be liable to an action for infringement. It was held that the Post Office was the agent of the English buyer and therefore, the Swiss seller could not be sued. After stating that the seller had sent the goods in pursuance of the order from the buyer to a particular named carrier namely the post office which is after all only a carrier of parcels like any other carrier, Lord Halsbury at p. 204 said

"It is not necessary that the carrier should have been named. If according to the ordinary course of delivery the carrier would be the person who would receive it that would be just as good for the purpose of the argument, as if the carrier had been actually named but we have not to consider that question here because the carrier is named. Then for what reason am I to depart from the well known and recognised principle of law that under these circumstances when goods are delivered by the order of the buyer to a named carrier from that moment the goods vest in the buyer?"

The decision in *Comber v. Leyland*³ is very important for our purpose in that it explains the meaning and implication of the word remit which is the word used by the master when it was used by the Government Department to remit the amount by cheque. There was in that case no express reference to the post office at all. Said Lord Herschell at p. 530

"I cannot doubt that the word remit there means this and nothing beyond this—that the bank post bills, when obtained in favour of the plaintiffs should be sent in the ordinary course and the ordinary manner in which such documents are sent by Commercial men namely by mail and that as soon as that had been done all obligation and all liability of the defendant ceased. I think it is impossible on these words to maintain that there was an obligation and a liability incumbent upon him until those bank post bills had reached the hands of the plaintiffs in England."

In *Mitchell Henry v. Norwich Union Life Insurance Society Ltd*⁴ the defendants sent a written notice to the plaintiff stating that the sum of £48-5-8 which would shortly become due should be paid at their office and asking the plaintiff when

1 L.R. (1910) 2 K.B. 509

2 L.R. (1878) A.C. 60

3 L.R. 16-3 A.C. 4

4 L.R. (1913) 2 K.B. 6

remitting" to return the notice. There was no express request to send the amount by post. Bailhache, J., held that by the use of the word "remitting" the defendants had impliedly authorised the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum in Treasury notes by post. Apart from the impropriety of sending a large amount in Treasury notes by post, this case does support the view that the request by the creditor "to remit" the amount due, without more, is tantamount to a request to send the amount by post. This decision was upheld by the Court of Appeal. On the other hand if there be no express or implied request by the creditor to send the amount by post the mere posting of a hundi duly endorsed in favour of the addressee does not operate as delivery of the hundi to the addressee so as to pass the title in the hundi to the addressee, for the post office in such circumstances does not become the agent of the addressee. The case of *Thorappa v Umedmalji*¹, is an instance on this point. In the case of *Ex parte Cole*² also there was no request by the addressee to send the bills by post. The result of the various judicial decisions are summarised in Benjamin on Sale, 8th edition, pages 769-771 and in Chalmers's Bills of Exchange 12th edition, pages 51-52.

A good deal of stress is laid by Sri Kolah on what he says is the basic difference between the postal regulations in England and those in India and he insists that the English decisions laying down the effect of sending cheques by post should not be rigidly followed here. He points out that in England the sender of the cheques has no right to reclaim the same after it is posted, and that, accordingly, immediately upon the posting of the cheques the post office becomes irrevocably the agent of the addressee and that, therefore, the delivery of the cheque to the post office is, in English Law, delivery to the addressee. But that, Sri Kolah maintains, is not the position under the Indian Post Office Act, 1898. We have been taken through the different sections of that Act and the rules made thereunder and Sri Kolah contends that under the Indian Law the sender has the right to reclaim the letter until it is actually delivered to the addressee, and, therefore, until that time the post office remains the agent of the sender and consequently the posting of a cheque cannot in India be regarded as delivery of the cheque to the addressee. We may, however, point out that this right of the sender, on which so much stress and importance are laid by the learned Advocate, is by no means an absolute right, for it is left entirely to the authorities to decide whether a letter once posted should be returned to the sender. This very narrow and qualified right can hardly be regarded as bringing about a position so different from that prevailing in England as to make the English decisions wholly inapplicable. It may also be mentioned that in spite of such contention the English decisions have been adopted by the Courts in India, e.g. *Thorappa v Umedmalji*¹ and *The Indian Cotton Company, Ltd v Hari Poonjoo*³. It is, however, not necessary to pursue this line of reasoning any further for the principles underlying the English decision are clearly consonant with the provisions of the Indian Law. There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender

1 (1923) 25 Bom. L.R. 604

2 L.R. (1873) 9 Ch. App. 27

3 I.L.R. (1937) Bom. 763

having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclamation. Of course if there be no such request, express or implied then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself. Apart from this principle of agency there is another principle which makes the delivery of the cheque to the post office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance (see section 50 of the Indian Contract Act and illustration (d) thereto).

Sri Kollah points out that when the Indian Contract Act, 1872, was passed, the Indian Post Office Act, 1866, was in force. He has taken us through the relevant provisions of that old Act and he points out that those provisions were quite different from those of the present Act. According to him illustration (d) to section 50 of the Indian Contract Act must, after the passing of the Act of 1898, be taken to have become inappropriate, obsolete and incorrect. We do not think that there is any basic difference between the two Acts in respect of the matter under discussion. It does not appear to us that the Act of 1898 enlarges the right of the sender to reclaim the postal article to such an extent as to nullify illustration (d) or otherwise to affect the well known general principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promisee.

Applying the above principles to the facts found by the Tribunal the position appears to be this. The engagement of the Government was to make payment by cheques. The cheques were drawn in Delhi and received by the assessee in Aundh by post. According to the course of business usage in general to which, as part of the surrounding circumstances attention has to be paid under the authorities cited above the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles and according to the Tribunal's findings they were in fact received by the assessee by post. Apart from the implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amounts of the bills by cheques. This, on the authorities cited above clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It can scarcely be suggested with any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India. This posting in Delhi, in law amounted to payment in Delhi. In this view of the matter the referred question should with respect have been answered by the High Court in the affirmative. We, therefore allow the appeal and answer the question accordingly. In view of the fact that the appellant has failed in the main argument but has succeeded on a new one we think no order should be made as to costs except that each party should bear and pay his or its own costs before us as well as before the High Court.

Agent for appellant *R H Dharwadkar & G H Rajadhyaksha*

SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT —B K MUKHERJEA, S R DAS, N H BHAGWATI, B JAGANNADHADAS AND T L VENKATARAMA AYYAR

M K Gopalan and another

*Petitioners**

v

The State of Madhya Pradesh

Respondent.

Criminal Procedure Code (V of 1898) section 14—Appointment of Special Magistrate under—If discriminatory and hit by Article 14 of the Constitution of India (1950)—Sanction to prosecute under section 197 (1), Criminal Procedure Code (V of 1898)—Essentials—If should specify the Court before which trial is to be held

Where the Special Magistrate under section 14 of the Criminal Procedure Code has to try the case entirely under the normal procedure, and no special procedure is to be adopted there is no question of any discrimination between persons who have committed similar offences. The law is not therefore hit by Article 14 of the Constitution.

Though the sanction given under section 197 (2) does not disclose that all the facts constituting the offences to be charged were placed before the sanctioning authority and the sanction does not state the time or place of the occurrence or the transactions involved in it or the persons with whom the offences were committed, the lacuna if any can be remedied in the course of the trial by specific evidence in that behalf.

Under sub-section (2) of section 197 of the Criminal Procedure Code the sanctioning Government may specify a Court for the trial of the case but is not bound to do so. When it does not choose to specify the Court the trial is subject to the operation of the other provisions of the Code. But even when it chooses to exercise the power of specifying the Court before which trial is to be held, such specification of the Court does not touch the question as to who is the person to function in such Court before which the trial is to take place. That is a matter still left to be exercised by the Provincial Government of the area where the trial is to take place and such Government may appoint a Special Magistrate. There is no warrant for treating the word 'Court' in sub-section (2) of section 197 as being the same as a person in sub-section (1) of section 14 of the Criminal Procedure Code.

Petition under Article 32 of the Constitution for the enforcement of fundamental rights

N C Chatterjee, Senior Advocate (*J B Dadachany* and *Rajinder Narain*, Advocates, with him) for Petitioners

K V Tambe and *I N Shroff*, Advocates, for Respondent

The Judgment of the Court was delivered by

Jagannadhadas, J—This is a petition under Article 32 of the Constitution and is presented to this Court under the following circumstances. Petitioner No. 1 before us was an Agricultural Demonstrator of the Government of Madras and was employed as an Assistant Marketing Officer in Central Provinces and Berar for the purchase and movement of blackgram and other grains on behalf of the Madras Government. He, as well as the second petitioner and 44 others are under prosecution before K. L. Pandey, a Special Magistrate of Nigpur, Madhya Pradesh in Case No. 1 of 1949, pending before him on charges of cheating, attempt to commit cheating, criminal breach of trust and criminal conspiracy (i.e., for offences punishable under section 420 read with section 120 B or 109, Indian Penal Code, section 409 and section 409 read with section 120 B, Indian Penal Code), and the allegation is that by reason of the acts committed by the accused, the Government of Madras had to incur an expenditure of Rs. 3,57,140-10-0 in excess of the amount due. The Special Magistrate before whom the case is now

* Petition No. 55 of 1954

pending was appointed by the Madhya Pradesh Government under section 14 of the Criminal Procedure Code, and as the first petitioner was a servant of the Government of Madras, the prosecution against him has been initiated by sanction given by the Government of Madras under section 197 (1) of the Criminal Procedure Code.

The validity of the prosecution is challenged on various grounds and the present petition is for quashing the proceedings on the ground of their invalidity. The three main points taken before us are—(1) Section 14 of the Criminal Procedure Code, in so far as it authorises the Provincial Government to confer upon any person all or any of the powers conferred or conferrable by or under the Code on a Magistrate of the first, second or third class in respect of particular cases and thereby to constitute a Special Magistrate for the trial of an individual case, violates the guarantee under Article 14 of the Constitution—(2) The sanction given under section 197 (1) of the Criminal Procedure Code for the prosecution as against the first petitioner is invalid, inasmuch as the order of the Madras Government granting the sanction does not disclose that all the facts constituting the offences to be charged were placed before the sanctioning authority, nor does the sanction state the time or place of the occurrence or the transactions involved in it, or the persons with whom the offences were committed—This contention is raised relying on the Privy Council case in *Gokulchand Durladas Motari v. The King*¹—(3) Even if the sanction under section 197 (1) of the Criminal Procedure Code is valid it is for the very Government which accords the sanction to specify also the Court before which the trial is to be held under section 197 (2), and in the absence of any such specification by the said Government, the power under section 14 of the Criminal Procedure Code of appointing a Special Magistrate for the trial of the case cannot be exercised by the Madhya Pradesh Government.

These points may now be dealt with *seriatim*. In support of the objection raised under Article 14 of the Constitution reliance is placed on the decision of this Court in *Anwar Ali Sarfar's case**. That decision however, applies only to a case where on the allotment of an individual case to a special court authorised to conduct the trial by a procedure substantially different from the normal procedure, discrimination arises as between persons who have committed similar offences by one or more out of them being subjected to a procedure, which is materially different from the normal procedure and prejudicing them thereby. In the present case, the Special Magistrate under section 14 of the Criminal Procedure Code has to try the case entirely under the normal procedure and no discrimination of the kind contemplated by the decision in *Anwar Ali Sarfar's case** and the other cases following it, arises here. A law vesting discretion in an authority under such circumstances cannot be said to be discriminatory as such, and is therefore not hit by Article 14 of the Constitution. There is, therefore no substance in this contention.

As regards the second ground which is put forward on the authority of the Privy Council case of *Gokulchand Durladas Motari v. The King*¹, it is admitted that the trial has not yet commenced. The Privy Council itself in the case men-

¹ (1913) 1 M.L.J. 243 L.R. 73 I.A. ~ 1932 S.C.R. 284 (1932) S.C.J. 55 (S.C. 30 A.I.R. 1948 P.C. 20 (P.C.))

tioned above has recognised that the lacuna, if any, in the sanction of the kind contemplated by that decision can be remedied in the course of the trial by specific evidence in that behalf. Learned counsel for the State, without conceding the objection raised, has mentioned to us that evidence in that behalf will be given at the trial. It is, therefore, unnecessary to decide the point whether or not the sanction, as it is, and without such evidence, is invalid.

It is the third point that has been somewhat seriously pressed before us. The contention of learned counsel for the petitioners is based on sub-section (2) of section 197 of the Criminal Procedure Code, which runs as follows :

"The Governor-General or Governor, as the case may be, exercising his individual judgment may determine the person by whom the manner in which the offence or offences for which, the prosecution of such Judge Magistrate, or public servant is to be conducted and may specify the Court before which the trial is to be held"

The argument is that it is for the very Government which sanctioned the prosecution under section 197 (1) to specify the court before which the trial is to be held and no other, and that consequently, in a case to which section 197 (1) applies, the exercise of any power under section 14 is excluded. It is said that though the exercise of the power under section 197 (2) in so far as it relates to specification of the court is concerned is discretionary and optional, but if in an individual case, that power is not exercised, it must be taken that the appropriate Government did not feel called upon to allot the case to any special court, and that, therefore, such allotment by another Government under section 14 would affect or nullify the power of the appropriate Government under section 197 (2). It is also suggested that such dual exercise of the power by two Governments would be contrary to the policy underlying section 197 which is for the protection of the public servant concerned, by interposing the sanction of the Government between the accuser and its servants of the categories specified therein. This argument is far fetched. In the first instance, there is no reason to think that section 197 (2) is inspired by any policy of protection of the concerned public servant, as section 197 (1) is. There can be no question of protection involved by an accused being tried by one court rather than by another at the choice of the Government. The power under section 197 (2) appears to be vested in the appropriate Government for being exercised, on grounds of convenience, or the complexity or gravity of the case or other relevant considerations. The argument as to the implication of non exercise of the power by the appropriate Government under section 197 (2) is also untenable. The power to specify a court for trial in such cases is a permissive power, and there can be no such implication, as is contended for, arising from the non exercise of the power.

This entire argument, however, is based on a misconception of the respective scopes of the powers under section 197 (2) and section 14. The one relates to the "court" and the other to the "person". Under sub-section (2) of section 197, the sanctioning Government may specify a court for the trial of the case but is not bound to do so. When it does not choose to specify the court, the trial is subject to the operation of the other provisions of the Code. But even when it chooses to exercise the power of specifying the court before which the trial is to be held, such specification of the court does not touch the question as to who is the person to function in such court before which the trial is to take place. That is a matter still left to be exercised by the Provincial Government of the area where the trial is to take place. The argument of learned counsel proceeds on treating the word

"court" in sub-section (2) of section 197 as being the same as a "person" in sub-section (1) of section 14, for which there is no warrant. There is accordingly no substance in this contention.

In addition to the above three points, learned counsel for the petitioners has also raised a further point that in the present case Shri K. L. Pandey who was first appointed as a Special Magistrate for the trial of the case, and to whose file on such appointment this case was transferred, was later on appointed as acting Sessions Judge for some time and ceased to have this case before him. He reverted back from his position as acting Sessions Judge to his original post. The point taken is that without a fresh notification appointing him as Special Magistrate and transferring the case to him as such, he cannot be said to be seized of this case as Special Magistrate. Here again, learned counsel for the State informs us, without conceding the point so taken, that he is prepared to advise the Government to issue the necessary notification and have the case transferred. In view of that statement, it is unnecessary to pronounce on the objection so raised.

In the result, all the points raised on behalf of the petitioners fail, and this petition must be dismissed.

It is desirable to observe that the questions above dealt with, appear to have been raised before the High Court at previous stages by means of applications under Article 226 and decided against. No appeals to this Court have been taken against the orders therein. Nothing that we have said is intended to be a pronouncement as to the correctness or otherwise of those orders, nor to encourage the practice of direct approach to this Court (except for good reasons) in matters which have been taken to the High Court and found against, without obtaining leave to appeal therefrom.

Petition dismissed

SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —MEHRCHAND MAHAJAN, C J., VINIAN BOSE AND GHULAM HASAN, JJ.

Biswabhusan Naik

*Appellant**

v
The State of Orissa

Respondent

Prevention of Corruption Act (II of 1937) section 5—Offences under—Sanction to prosecute—If should be in any particular form or set out the facts in respect of which it is given—Presumption under section 5 (2)—Scope—Charge and sanction—Absence of particulars in—Effect

It is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given. When facts are not set out in the sanction, proof has to be given *aloud* that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way.

In a prosecution for an offence under section 5 (1) (a) of the Prevention of Corruption Act what the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the

accused cannot satisfactorily account. Once that is established then the Court has to presume unless the contrary is proved, that the accused is guilty of the new offence created by section 5, namely criminal misconduct in the discharge of his official duty. Once the explanation of the accused is rejected as unsatisfactory, section 5 (3) of the Act is at once attracted and the Court is bound to presume (the word used in the section is 'shall' and not 'may') that the accused was guilty under section 5 (2), especially as this part of the section goes on to say "and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

The offence under section 5 (1) (a) does not consist of individual acts of bribe taking as in section 161 of the Indian Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which section 5 (3) requires the Court to draw. No particulars need to set out in the charge or the sanction in such a case.

On Appeal under Article 134 (1) (c) from the Judgment and Order, dated the 19th February, 1952, of the High Court of Orissa at Cuttack in Criminal Appeal No 66 of 1950, arising out of the Judgment and Order, dated the 19th September, 1950, of the Court of the Additional Sessions Judge, Cuttack Dhenkanal, Cuttack, in Sessions Trial No 9-C of 1950

Mur-ud Din Ahmed R Patnark and R C Prasad, Advocates for Appellant

R Ganapathy Iyer, for Respondent

The Judgment of the Court was delivered by

Bose J.—The appellant was an Inspector of Factories under the Government of Orissa. It was a part of his duty to inspect factories and mills in the State of Orissa. He toured the districts of Koraput and Balasore from 18th August, 1948 to 27th August, 1948 and from 29th September, 1948 to 30th October, 1948, respectively. The prosecution case is that he collected bribes from persons connected with some of the mills he inspected in those districts. It is said that he used to threaten to close their mills and impose other penalties for alleged defects unless they paid him a bribe.

On 3rd October, 1948, he was camping at the Dak Bungalow at Basta in the Balasore district. Because of information received against him his person and belongings were searched on that day and a sum of Rs 3,148 was recovered from him consisting of Rs 450 paid at the time as a trap and Rs 2,698 already in his possession. He was arrested on the spot but was later released on bail.

Departmental and other proceedings were taken against him and he was eventually brought to trial on 29th March, 1950 and charged under section 5 (2) of the Prevention of Corruption Act (II of 1947) for criminal misconduct in the shape of habitually accepting illegal gratification. He was also separately charged and separately prosecuted under section 161 of the Indian Penal Code for three specific offences of bribe taking but we are not concerned here with that as he was acquitted on all three counts. His conviction here is under section 5 (2) alone. The trial Court sentenced him to rigorous imprisonment for four years and a fine of Rs 5,000. The High Court upheld the conviction on appeal but reduced the sentence to two years and a fine of Rs 3,000.

The accused applied for a certificate to appeal under Article 134 (1) (c) on three points. The High Court held that two of them were not of sufficient importance to justify the issue of a certificate particularly as one of the two was covered by the principle laid down by this Court. But it granted leave on all three as it considered that the first point was of importance. The points were formulated as follows

"(i) whether the view of this Court as to the requirement of sanction in a case of this kind and the interpretation of *Morarka's case*¹, adopted by this Court in its judgment are correct,

(ii) whether the interpretation of this Court relating to the requirements as to the corroboration of an accomplice witness in a bribery case with reference to the latest unreported case of the Supreme Court which has been referred to in the judgment and which has since been reported in *Rameshwar v. State of Rajasthan*² is correct,

and

(iii) whether the law as propounded by the decision now sought to be appealed against with reference to the considerations that arise in judging the presumptions under section 5 (3) of the Prevention of Corruption Act is correct

The first point arises in this way. Four kinds of criminal misconduct are set out in section 5 of the Prevention of Corruption Act. They are enumerated in clauses (a), (b), (c) and (d) of sub-section (1). The sanction is general and does not specify which of these four offences was meant. It runs as follows

Government of Orissa
Commerce and Labour Department
Order No 4581/Com, dated 3rd November 1948

In pursuance of section 6 of the Prevention of Corruption Act 1947 (II of 1947), the Governor of Orissa is hereby pleased to accord sanction for prosecution of Sri B B Nayak Inspector of Factories, Orissa employed in connection with the affairs of the Province under sub-section (2) of section 5 of the said Act

2 Nature of offence committed

Criminal misconduct in discharge of official duty

By order of the Governor
Sd / V Ramanathan,
Secretary to Government "

It was contended that the Privy Council held in *Gokulchand Dwarkadas Morarka v. The King*¹ that such a sanction is invalid. The High Court rejected this argument. We agree with the High Court.

The passage of the Privy Council judgment on which reliance is placed is as follows :

"In their Lordships's view, in order to comply with the provisions of clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential since clause 23 does not require the sanction to be in any particular form nor even to be in writing. But if the facts constituting the offence charged are not known on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."

The judgment of the Judicial Committee relates to clause 23 of the Cotton Cloth and Yarn (Control) Order, 1933, but the principles apply here. It is no more necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given than it was under clause 23 of the Order which their Lordships were considering. The desirability of such a course is obvious because when the facts are not set out in the sanction proof has to be given *abundante* that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way.

The High Court finds that the facts to which the sanction relates were duly placed before the proper sanctioning authority. We need not consider the evidence about telephone calls and the like because the letter of the District Magistrate

asking for sanction (Exhibit 25) is enough to show the facts on which the sanction is based. It is in these terms

"I have the honour to report that B B Nayak Inspector of Factories Orissa, in the course of his visit to this district had been visiting certain mills and on information received by me that he had been collecting heavy sums as illegal gratification from the Manager or Proprietor of Mills under threat of mischief to the mill owners it was arranged to verify the truth of this information by handing over three hundred rupee notes marked with my initials in presence of the Superintendent of Police and two other respectable gentlemen and millowners on the evening of the 2nd October 1948. On the 3rd October the Factory Inspector having actually received the illegal gratification of Rs 450 which sum included the three marked hundred rupee notes the Prosecuting Inspector seized the marked notes along with a further heavy sum of Rs 2,698 from his possession.

Under section 6 of the Prevention of Corruption Act 1947 the accused being a public servant in the employ of the Provincial Government the sanction of the Provincial Government is necessary prior to taking cognisance of an offence under section 161 Indian Penal Code or sub-section (2) of section 5 of the Act.

A sanction based on the facts set out in this letter, namely the information received about the collection of heavy sums as bribes and the finding of Rs 2,698 in his possession would be sufficient to validate the present prosecution. It is evident from this letter and from the other evidence that the facts placed before the Government could only relate to offences under section 161 of the Indian Penal Code and clause (a) of section 5 (1) of the Prevention of Corruption Act. They could not relate to clauses (b) or (c). Therefore, when the sanction was confined to section 5 (2) it could not in the circumstances of the case, have related to anything but clause (a) of sub-section (1) of section 5. Therefore, the omission to mention clause (a) in the sanction does not invalidate it.

The present prosecution is confined to section 5 (1) (a) which runs as follows :

(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code.

Then comes sub-section (3) which sets out a new rule of evidence in these terms

"In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession for which the accused person cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income may be proved and on such proof the Court shall presume unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

Therefore, all that the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the Court has to presume, unless the contrary is proved that the accused is guilty of the new offence created by section 5, namely criminal misconduct in the discharge of his official duty.

Now the accused was found in possession of Rs 3,148. He accounted for Rs 450 of that sum by showing that it was paid to him at the time as a trap. He has been acquitted of that offence, so all he had to account for was the balance Rs 2,698. This is a large sum for a touring officer to carry with him in cash.

while on tour. His explanation was not considered satisfactory and that is a question of fact with which we are not concerned in this Court. Therefore, all that remains to be seen is whether this was disproportionate to his known sources of income.

The accused is a Government Factory Inspector and we were told that his salary is only Rs. 450 a month. The High Court finds that the total sums drawn by him during his entire period of service of thirteen months was Rs. 6,045 as salary and Rs. 2,155 as travelling allowance. It also finds that he owns 0.648 acres of land which brings in no income worth the name. On the expenditure side of the accused's account the High Court finds that he has a substantial family establishment which would not leave him enough margin for saving such a large sum of money. No other source of income has been disclosed. It is evident that no touring officer of his status and in his position would require such a large sum of money for his touring purposes even if he was away from headquarters for a month. His explanation was considered unsatisfactory by both Courts and was disbelieved. These are all questions of fact. Once the facts set out above were found to exist and the explanation of the accused rejected as unsatisfactory, section 5 (3) was at once attracted and the Court was bound to presume (the word used in the section is shall and not may) that the accused was guilty under section 5 (2), especially as this part of the section goes on to say—

and his conviction therefor shall not be invalidated by reason only that it is based solely on such presumption.

These facts alone are enough to sustain the conviction and we need not consider the other matters. The High Court was right in holding that the sanction was sufficient and in convicting the accused.

The third point set out in the certificate of the High Court relates to the absence of particulars in the charge and we gathered from the arguments in the sanction. But no particulars need be set out in the charge in such a case because the offence under section 5 (1) (a) does not consist of individual acts of bribe taking as in section 161 of the Indian Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which section 5 (3) requires the Court to draw. There was therefore no illegality either in the sanction or in the charge, nor has the accused been prejudiced because he knew everything that was being urged against him and led evidence to refute the facts on which the prosecution relied. He was also questioned about the material facts set out above in his examination under section 342 of the Criminal Procedure Code and was given a chance then as well to give such explanation as he wished.

The appeal fails and is dismissed.

Agent for Respondent *R. H. Dhebar*

Appeal dismissed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — MEHRCHAND MAHAJAN, C J, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR JJ

Kishan Lal and Satya Narain

Appellants*

v
Bhanwar Lal

Respondent

Defence of India Rules (as applied to Marwar) Rule 90 (c) (2)—Prohibition against entering into forward contracts or option in bullion—Suit by agent claiming indemnity against the principal for loss sustained in carrying out directions of the principal in respect of such contracts—If hit by Rule 90 (c) (2)

A contract for sale or purchase of bull on may be entered into by and between the parties directly or it may be made through agents. In either case if such contract is not entered into at Marwar, nor is it agreed to be performed wholly or in part in Marwar it would be outside the notification (of 3rd June, 1943, adding new rule 90 (c) Defence of India Rules, as applied to Marwar) and cannot be held to be illegal.

Where the plaintiff (agents) paid the losses resulting from the transactions to third parties on behalf of the defendant in exercise of authority conferred upon them by the latter, the acts of the agent are lawful ones assuming the transactions took place and the payments were made outside Marwar. The agents are not entitled to claim indemnity in respect of such losses. The right to indemnity which is an incident of the contract of agency is not hit by the notification at all and is a matter which is entirely collateral to a forward contract of purchase and sale of bullion which the notification aims at prohibiting.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 11th September, 1951 of the High Court of Judicature for the State of Rajasthan at Jodhpur in D B Civil Appeal (Iyas + Khas) No 6 of 1950

H J Umrigar Sri Varain Andley and Rajinder Narain, Advocates for Appellants,
Radhey Lal Iggarwal and B P Maheshwari, Advocates for Respondent

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is on behalf of the plaintiffs and has come before us on a certificate granted by the High Court of Rajasthan, under Article 132 (1) of the Constitution, on the ground that the case involves a substantial question of law as to the interpretation of the Constitution. The appellant has also put in a petition praying for leave to urge other grounds on the merits of the case.

The suit, out of which this appeal arises, was brought by the appellants, as plaintiffs on the 16th August 1946, in the District Court I at Jodhpur in Rajasthan against the defendant respondent, claiming to recover from the latter a sum of Rs 10,342 annas odd together with interest and costs. The plaintiffs, at all material times carried on the business of commission agents both at Indore and Jodhpur under the name and style of 'Kanmal Kishenmal' and 'Kanmal Surajmal' respectively and their case is that between September and December, 1945, the defendant entered into several forward contracts for the purchase and sale of bullion through the plaintiffs' firm at Indore. These transactions proved unprofitable to the defendant and except a small profit of Rs 103 annas odd which one of these transactions fetched, every one of the rest ended in loss and the loss aggregated to a sum of Rs 21,423-1-6 pias. It is averred in the plaint that this entire amount was paid to third parties at Indore by the plaintiffs on behalf of the defendant and that the plaintiff received, in all, a sum of Rs 11,457-8-0, which the defendant paid from time to time, towards these losses, to the plaintiffs' firm at

Jodhpur The plaintiffs were therefore entitled to the balance of Rs 9,861 which together with interest came up to Rs 10,342 and this was the claim laid in the plaint.

The suit was transferred from the District Court to the Original Side of the High Court at Jodhpur and the defendant filed his written statement in the High Court on the 27th October, 1947. The defence was a complete denial of the plaintiffs' claim and it was contended *inter alia* that the transactions in suit amounted to wagering contracts and according to the law prevalent in Marwar, as contained in the notification of the Marwar Government dated the 3rd June, 1943, all forward business contracts in bullion, in which the date fixed for delivery exceeded 12 days, were illegal and were punishable as criminal offences. No suit was therefore maintainable on the basis of these transactions.

On these pleadings a number of issues were raised of which issue No 5 stood thus:

"Are the transactions in dispute in the suit illegal and the present suit in respect of these transactions is not maintainable on account of the notification dated 3rd June 1943?"

The suit came up for hearing before a single Judge of the Jodhpur High Court sitting on the Original Side. No evidence was adduced by the parties and the case was heard only on issue No 5 which was treated as an issue on a pure question of law. It was held by the learned Judge that as it was admitted by the plaintiffs that the contracts to which the suit related covered a period exceeding 12 days, they came within the prohibition of the notification referred to above and a suit based upon them was not maintainable in law. The judgment shows that a contention was raised on behalf of the plaintiffs that the notification was confined only to contracts made in Marwar or intended to be performed in that place, and as the contracts in suit were all entered into at Indore they could not be hit by the notification. This argument was repelled by the learned trial judge on a two-fold ground. It was said in the first place that as the suit was actually brought in the Jodhpur Court, the plaintiffs could not avoid facing the notification and the Jodhpur Court could not give them a relief in violation of its own laws. The other reason assigned was based upon section 13 of the Civil Procedure Code and it was said that if the plaintiffs could and did get a decree on the basis of these transactions in the Indore Court and wanted to enforce the same as a foreign judgment in the court of Jodhpur, the latter would be justified in refusing to give effect to such judgment under section 13 of the Marwar Civil Procedure Code, on the ground that such judgment was founded on a breach of law in force in Marwar. In this view the learned Judge, by his judgment dated the 2nd March, 1948, dismissed the plaintiffs' suit.

The plaintiffs thereupon took an appeal, against this judgment, to the Appeal Bench of the Jodhpur High Court and the appeal was heard by a Division Bench consisting of Nawal Kishore, C.J. and Kanwar Amar Singh, J. The learned Judges accepted the legal position taken up by the plaintiffs, that the contracts could be void only if they were entered into at Marwar or were intended to be performed, either wholly or partly, at Marwar. Admittedly they were entered into at Indore outside Marwar, but the learned Judges held that from the fact that certain payments were made by the defendant and accepted by the plaintiffs towards these contracts at Marwar, it could be inferred that it was a term of the contracts that they would be performed at Marwar. Another point raised on behalf of the plaintiffs, that as the notification of 3rd June, 1943 itself came to an end

by efflux of time on the 30th September, 1946 there was no obstacle in the way of the plaintiffs' obtaining a decree at any time after that was repelled by the learned Judges on the ground that as the contracts themselves were illegal, at the time when they were entered into, by reason of their violating the provisions of the notification, the fact that the notification subsequently ceased to be operative could not make the illegal contracts lawful. The result was that by its judgment, dated the 24th September, 1948, the appellate bench of the High Court dismissed the appeal.

The plaintiffs thereupon with the leave of the court took an appeal against this decision to the Ijlas-i Khas of the State of Jodhpur as it then existed. While the appeal of the plaintiffs was pending before the Ijlas-i Khas of the Jodhpur State the integration of the various States of Rajasthan took place and the United States of Rajasthan was formed on the 7th of April, 1949. The Rajasthan High Court Ordinance was promulgated by the Rajpramukh of Rajasthan on the 21st June, 1949 and on the 29th of August following, the High Court of Rajasthan was constituted. Another ordinance known as the 'Rajasthan Appeals and Petitions (Discontinuance) Ordinance 1949' provided by section 4, that pending appeals before the Ijlas-i Khas of any of the covenanting States if they related to judicial matters were to be heard by a special court to be constituted by the Rajpramukh. This section was amended by an amending ordinance dated the 24th of January, 1950 and all these pending appeals were directed to be heard and disposed of by the Rajasthan High Court established under the Rajasthan High Court Ordinance of 1949. In accordance with this provision the appeal of the plaintiffs was transferred to the High Court of Rajasthan for disposal. The Constitution of India came into force on the 26th of January, 1950 and when the appeal came up for hearing before the Rajasthan High Court a preliminary point was raised as to whether the appeal should not be transferred to the Supreme Court for disposal under Article 374 (4) of the Constitution. The matter was referred for consideration by a Full Bench, and the Full Bench decided that Article 374 (4) of the Constitution had no application to the present case and the appeal was to be heard by the High Court of Rajasthan. The appeal was then placed for hearing before a Division Bench of the Rajasthan High Court and by their judgment dated the 11th of September, 1951, the learned Judges dismissed the appeal and affirmed the decision of the courts below. Against this judgment the plaintiffs got leave to file an appeal to this court under Article 132 (1) of the Constitution and that is how the matter has come before us.

The only constitutional point involved in the appeal is whether Article 374 (4) of the Constitution is attracted to the facts of the present case and whether the appeal should therefore have been transferred to this court for disposal instead of being heard and disposed of by the Rajasthan High Court. In view of the fact that we have acceded to the prayer of the appellants and have granted them leave to urge other grounds relating to the merits of the case in support of the appeal, this constitutional point has nothing but an academic importance and is not pressed by the appellants. We would therefore proceed to consider the points upon which the learned counsel for the appellants has attempted to assail the propriety of the decision of the Rajasthan High Court, on its merits.

The learned Judges of the Rajasthan High Court took the view, and it seems to us quite properly, that the courts below were not right in treating issue No 5

as raising a pure question of law where no investigation of facts was necessary. The High Court has pointed out that the defendant while raising the plea of illegality of the contracts in his written statement, nowhere alleged that the contracts were entered into at Marwar or were intended to be performed there. On the other hand, the plaintiffs expressly averred that the contracts were made at Indore. The one fact from which the appeal bench of the Jodhpur High Court drew the conclusion that the contracts were intended to be performed, partly at least, at Marwar, was that certain payments towards the losses resulting from the transactions were made by the defendant to the plaintiff's firm at Marwar. This, as the Rajasthan High Court points out, does not necessarily lead to the inference that it was a part of the original agreement entered into by the parties, that the performance was to be made at Marwar. The payments might have been made, as a matter of convenience, upon express instructions from the Indore firm. It is also pointed out that if the general principle of law is that it is the debtor who has to seek the creditor, as the defendant ranked here as a debtor by reason of the losses suffered in the business, it was for him to seek the plaintiffs at Indore and not for the plaintiffs to seek him at Jodhpur. The suit, it is to be further noted, was brought at Jodhpur only on the allegation that the defendant resided within its jurisdiction. There was no averment in the plaint that any part of the cause of action arose within its jurisdiction.

On all these grounds the Rajasthan High Court was of opinion that the courts below should have either framed a specific issue on facts or if they thought that issue No. 5 was sufficiently wide to cover the question of fact as well, they should have given an opportunity to the parties to lead evidence for arriving at a finding whether the contracts were to be performed in whole or in part in Marwar. The learned Judges themselves were inclined to send the case back, on remand, in order that evidence might be adduced on this point. But they did not take this step as they were told that the contracts were entered into by telegrams and no terms of any sort were settled between the parties, it being understood that the business was to be conducted according to the custom and usage of the market.

The learned Judges further discussed a question of Private International Law, apparently raised on behalf of the defendant that even if the contract was made outside Marwar and not intended to be performed there, still the court of Marwar should refuse to enforce the contract as it was illegal according to the *lex fori*, that is to say, the law of the place where the suit was brought. This contention of the defendant was not accepted and it was held that if the contract was enforceable by the law of the place where it was made or where it was to be performed, it could not be held unenforceable in Jodhpur on the ground of its being opposed to public policy as the prohibition in the notification was not general in its nature and the contract in question cannot be said to be opposed to any basic ideas of morality or public policy. After saying all these however, the learned Judges of the Rajasthan High Court dismissed the suit on the short point that even if the sale or purchase under the contracts might have taken place outside Marwar yet the notification not only hit the contracts of sale and purchase but the contract of agency itself relating to such transactions. It is said then that in the case of *Pakka Adat*, primarily the place of payment of profit is the place where the constituent resides and in the present case the plaintiffs had alleged themselves to be *Pakka Adahas*. Consequently the agency contract would be hit by the notifi-

cation as it was to be performed at Jodhpur where the defendant lives. We do not think that the learned Judges' approach to the case has been a proper one or that the reasoning adopted by them can be accepted as sound.

By the notice of 3rd June, 1943, an additional rule, namely, rule No. 90 (c) was added to the Defence of India Rules as applied to Marwar. Sub-rule (2) of rule 90 (c) laid down that no person shall enter into forward contract or option in bullion. In sub-rule (1) 'forward contract' was defined to mean "a contract for delivery of bullion at a future date such date being later than 12 days from the date of the contract", and a 'contract' was defined to mean "a contract made or to be made or to be performed in whole or in part in Marwar relating to the sale or purchase of bullion". The present suit is really not one to enforce any contract relating to purchase or sale of bullion which comes within the prohibition of this notification. It is a suit by an agent claiming indemnity against the principal, for the loss which the agent had suffered, in carrying out the directions of the principal. The right to such indemnity is founded on the statutory provision contained in section 222 of the Indian Contract Act which stands as follows:

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him."

Here the plaintiffs paid the losses resulting from the transactions to third parties, on behalf of the defendant, in exercise of the authority conferred upon them by the latter. These acts of payment were certainly lawful acts if we assume, as indeed we must, that all these transactions took place and the payments were made outside Marwar. It is the statutory right which flows from the contract of agency that the plaintiffs are seeking to enforce against the defendant and the suit has been brought in the Jodhpur court as the defendant resides within that jurisdiction. The fact that in case of *Pokki Adat* the place of payment is normally where the constituent resides is immaterial for our present purpose. A contract for sale or purchase of bullion may be entered into by and between the parties directly or it may be made through agents. In either case if such contract is not entered into at Marwar, nor is it agreed to be performed wholly or in part in Marwar, it would be outside the notification and cannot be held to be illegal. The fallacy in the reasoning of the learned Judges lies in the fact that the contract between principal and agent, which is entirely collateral to the contract of purchase and sale, has been held by them as coming within the prohibition of the notification merely on the ground that payment, by the agent to the principal, of the profits of the transaction could be made or demanded at the place where the principal resides. In our opinion the right to indemnity, which is an incident of the contract of agency, is not hit by the notification at all and is a matter which is entirely collateral to a forward contract of purchase and sale of bullion which the notification aims at prohibiting. We hold therefore that the courts were not right in dismissing the plaintiffs' suit on the ground that the contracts upon which the suit was based were illegal by reason of their contravening the provisions of the notification. The result is that we set aside the judgments of the courts below and send the case back to the Original Court of Jodhpur in order that it may be tried on all the other issues raised in the suit after giving opportunity to the parties to adduce such evidence as they want to adduce. The plaintiffs appellants will have their costs up to this stage. Further costs will abide the result.

— Judgments of the Courts below set aside.

SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —MEHRCHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Tolaram Relumal and another

Appellants*

The State of Bombay

Respondent

Bombay Rent Restriction Act (LVII of 1947), sect on 18 (1)—Executory agreements to lease premises under construction—Acceptance of consideration—If offence—Interpretation of statutes—Construction of penal provision—Duty of Court

Where the owners of an incomplete building accepted Rs. 2,400 from the complainant in respect of an agreement between them that the owners were bound to give and the complainant was entitled to take possession of a flat in a building as soon as the said building was completed on the agreed rent of Rs 75 per month, the acceptance of Rs 2,400 by the owners does not fall within the mischief of section 18 (1), of Bombay Act LVII of 1947

The provisions of section 18 (1) are penal in nature and it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature.

The language of section 18 (1) of the Act in respect of the grant, renewal or continuance of a lease envisages the existence of a lease and the payment of an amount in respect of that lease or with reference to that lease. Without the existence of a lease there can be no reference to it. If the Legislature intended to punish persons receiving paguee on merely executory contracts it should have made its intention clear by use of clear and unambiguous language.

Appeal under Article 134 (1) (c) of the Constitution of India from the Judgment and Order, dated the 18th February, 1953, of the High Court of Judicature at Bombay in Criminal Appeal No 592 of 1952 arising out of the Judgment and Order, dated the 21st May, 1952, of the Court of the Presidency Magistrate, 19th Court, Bombay, in Case No 147/P/1951

B H Lulla and Rajinder Narain, Advocates, for Appellants

Perus A Mehla, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mehrchand Mahajan, C J—The appellants were charged under section 18 (1) of the Bombay Rent Restriction Act, 1947, for receiving from Shankar Das Gupta, through Mathra Das, accused No 3, on 23rd November, 1950, a sum of Rs 2,400 as premium or paguee in respect of the grant of lease of Block No. 15 in a building under construction. The magistrate found the appellants guilty of the charge and sentenced each of them to two months' R I and a fine of Rs 1,200. Mathra Das was convicted and sentenced to one day's S I and a fine of Rs 100. The fourth accused Roshanlal Kanjilal was acquitted. Mathra Das preferred no appeal against his conviction and sentence. The appellants preferred an appeal to the High Court against their conviction. This was heard by Gajendragadkar and Chaimani, JJ, on the 8th of October, 1952. It was contended, *inter alia*, that even if it were held that the appellants had accepted the sum of Rs 2,400 they could not be said to have committed an offence under section 18 (1) of the Act inasmuch as the amount could not in law be held to be a premium in respect of the grant of a lease. On this point the learned Judges said as follows—

* In the present case the work regarding the building which still remained to be done was so important that both the parties agreed that the complainant should get into possession after the said

work was completed. In such a case unless the building is completed the tenant has no right which can be enforced in a court of law. If the landlord finds it impossible for any reason to complete the building what is the right which an intending tenant can enforce against him. Therefore, in our opinion there is considerable force in the contention urged by Mr. Lulla that in the present case even if it be held that the accused had received Rs. 2,400 in the circumstances to which we have already referred that would not bring them within the mischief of section 18 (1) because there has been no grant of a lease at all. There is only an agreement that the landlord would lease to the complainant a particular flat after the building has been fully and properly completed. It does appear that section 18 (1) does not bring within its mischief executory agreements of this kind.

A contrary view had been expressed in Criminal Revision No. 1178 of 1949 by another Bench of the High Court on the construction of section 18 (1). The matter was therefore referred to the Full Bench. The question framed for the consideration of the Full Bench was in these terms —

‘If as owners of an incomplete building the appellants accepted Rs. 2,400 from the complainant in respect of an agreement between them that the appellants were bound to give and the complainant was entitled to take possession of flat No. 15 in the said building as soon as the said building was completed on the agreed rent of Rs. 75 per month did the acceptance of Rs. 2,400 by the appellants fall within the mischief of section 18 of Bombay Act LVII of 1947?’

This question, if answered in the negative by the Full Bench, would have concluded the case.

The Full Bench answered the question referred in the affirmative. It held that the oral agreement did not constitute a lease but it amounted to an agreement to grant a lease in future, and that the receipt of consideration for an executory agreement was within the mischief of section 18 (1) of the Act. The Full Bench expressed its opinion in these terms —

“What the Legislature has penalized is the receipt of a premium by the landlord and the Legislature has also required a nexus between the receipt by the landlord of a premium and the grant of a lease of any premises. Therefore a receipt alone by a landlord would not constitute an offence, but that receipt must be connected with the grant of the lease of any premises. Unless that connection is established no offence would be committed. The contention of Mr. Lulla on behalf of the accused is that the receipt of the premium must be simultaneous with the grant of the lease. If the lease comes into existence at a future date, then the receipt of a premium according to him is not ‘in respect of’ the grant of a lease. Therefore the key words according to us in this section are ‘in respect of’. It is relevant to observe that the Legislature has advisedly not used the expression ‘for’ or ‘in consideration of’ or ‘as a condition of’ the grant of a lease. It has used an expression which has the widest connotation and the expression used is ‘in respect of’. ‘In respect of’ means in its plain meaning ‘connected with or attributable to’, and therefore it is not necessary that there must be a simultaneous receipt by the landlord with the grant of the lease. So long as some connection is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied. In our opinion it is impossible to contend that in the present case there was no connection whatever between the landlord receiving the premium and his granting the lease of the premises. It is true that when he received the premium he did not grant a lease. It is true that all that he did when he received the premium was to enter into a contract with his tenant to grant a lease in future. But the object of the landlord in receiving the premium and the object of the tenant in paying the premium was undoubtedly on the part of the landlord the letting of the premises and on the part of the tenant the securing of the premises. Therefore the object of both the landlord and the tenant was the grant of the lease of the premises concerned and that object was achieved partly and to start with by an oral agreement being arrived at between the landlord and the tenant with regard to the granting of this lease, the lease being completed when delivery of possession of the premises would be given. Therefore, in our opinion, on the facts of this case it is not possible to contend that the payment or the premium received by the landlord was unconnected with the grant of a lease of any premises. The fact that no grant was made at the time when the premium was received the fact that there was merely an agreement to grant a lease, the fact that the lease would come into existence only at a future date are irrelevant facts so long as the connection between the receiving of the premium and the granting of the lease is established.”

On return from the Full Bench, the Division Bench considered the other contentions raised on behalf of the appellants and held that there were no merits in any one of those points and in the result the appeal was dismissed. It was certified that the case involved a substantial question of law and was a fit one for appeal to this Court. This appeal is before us on that certificate.

The principal question to decide in the appeal is whether the answer given by the Full Bench to the question referred to it is right, and whether receipt of a sum of money by a person who enters into an executory contract to grant a lease of a building under construction falls within the mischief of section 18 (1) of the Act?

Section 18 (1) provides

"If any landlord either himself or through any person acting or purporting to act on his behalf receives any fine, premium or other like sum or deposit or any consideration, other than the standard rent in respect of the grant, renewal or continuance of a lease of any premises such landlord or person shall be punished."

in the manner indicated by the section. Under the section the money must be received by the landlord in respect of the grant of a lease. The section refers to the "grant, renewal or continuance of a lease." *Prima facie*, it would not cover an executory agreement to grant a lease. The words "renewal or continuance of a lease" clearly suggest that there must be a renewal or continuance of a subsisting lease. In the context, grant of tenancy means the grant of new or initial tenancy, renewal of tenancy means the grant of tenancy after its termination, and continuance seems to contemplate continuance of a tenancy which is existing. Whether or not an executory agreement for grant of a lease comes within the ambit of the section by reason of the use of the words "in respect of" would be examined hereinafter. Before doing so it may be stated that an instrument is usually construed as a lease if it contains words of present demise. It is construed as an executory agreement, notwithstanding that it contains words of present demise, where certain things have to be done by the lessor before the lease is granted, such as the completion or repair or improvement of the premises, or by the lessee, such as the obtaining of sureties. (*Vide Halsbury's Laws of England Second Edition Vol 20, pages 37 to 39*) On the facts of this case therefore the Full Bench very rightly held that the oral agreement made between the parties did not constitute a lease but it amounted to an agreement to grant a lease in future.

It may further be pointed out that, in fact in this case the lease never came into existence. Moreover, in view of the provisions contained in the Bombay Land Requisition Act XXXIII of 1948 as amended, the appellants could not let out the building even after its completion unless on a proper notice being given the Controller of Accommodation did not exercise his powers under that Act. It so happened that as soon as the building was completed the Controller of Accommodation requisitioned it, and thus no occasion arose for giving effect to the executory contract.

The question that needs our determination in such a situation is whether section 18 (1) makes punishable receipt of money at a moment of time when the lease had not come into existence, and when there was a possibility that the contemplated lease might never come into existence. It may be here observed that the provisions of section 18 (1) are penal in nature and it is a well settled rule of

construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. As pointed out by Lord Macmillan in *London and North Eastern Railway Co v Berriman*¹,

"where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however, beneficent its intention beyond the fair and ordinary meaning of its language"

The High Court took the view that without stretching the language of section 18 (1) beyond its fair and ordinary meaning the very comprehensive expression "in respect of" used by the Legislature could lead to only one conclusion, that the Legislature wanted the penal consequences of section 18 (1) to apply to any nexus between the receipt by a landlord of a premium and the grant of the lease. In our judgment, the High Court laid undue emphasis on the words "in respect of" in the context of the section. Giving the words "in respect of" their widest meaning viz, 'relating to' or 'with reference to' it is plain that this relationship must be predicated of the grant, renewal or continuance of a lease, and unless a lease comes into existence simultaneously or nearabout the time that the money is received, it cannot be said that the receipt was "in respect of" the grant of a lease. The relationship of landlord and tenant does not come into existence till a lease comes into existence, in other words, there is no relationship of landlord and tenant until there is a demise of the property which is capable of being taken possession of. If the Legislature intended to make receipts of money on executory agreements punishable, the section would have read as follows "receives any fine, premium or other like sum or deposit or any consideration other than the standard rent in respect of the lease or an agreement of lease of the premises, such landlord or person shall be punished" in the manner indicated in the section. The section does not make the intention punishable, it makes an act punishable which act is related to the existence of a lease. It does not make receipt of money on an executory contract punishable, on the other hand it only makes receipt of money on the grant, renewal or continuance of the lease of any premises punishable and unless the lease comes into existence no offence can be said to have been committed by the person receiving the money. It is difficult to hold that any relationship of landlord and tenant comes into existence on the execution of an agreement executory in nature or that the expression "premium" can be appositely used in connection with the receipt of money on the occasion of the execution of such an agreement. It may well be that if a lease actually comes into existence after any receipt of money which has a nexus with that lease may fall within the mischief of section 18 (1), but it is unnecessary to express any final opinion on the question as in the present case admittedly no lease ever came into existence and the relationship of the landlord and tenant was never created between the parties. The landlord never became entitled to receive the rent from the tenant and the tenant never became liable to pay the rent. There was no transfer of interest in the premises from the landlord to the tenant. On its plain, natural grammatical meaning, the language of the section does not warrant the construction placed upon it by the Full Bench merely by laying emphasis on the words "in respect of". In our opinion the language of the section "in respect of the grant, renewal

or continuance of a lease" envisages the existence of a lease and the payment of an amount in respect of that lease or with reference to that lease. Without the existence of a lease there can be no reference to it. If the Legislature intended to punish persons receiving puggree on merely executory contracts it should have made its intention clear by use of clear and unambiguous language.

The construction we are placing on the section is borne out by the circumstance that it occurs in Part II of the Act. Section 6 of this Part provides that "in areas specified in Schedule I this Part shall apply to premises *let* for residence, education, business trade or storage." This Part relates to premises let, in other words, premises demised or given on lease and not to premises that are promised to be given on lease and of which the lease may or may not come into being. The definition of the expression 'landlord' also suggests the same construction. 'Landlord' as defined in section 3 of the Act means 'any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit, of any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant.' It is obvious that on the basis of an executory agreement the appellants would not be entitled to receive any rent. They would only be entitled to receive rent after the lease is executed and actual demise of the premises or their transfer is made in favour of the complainant. The definition of the expression 'tenant' also suggests the same construction.

Mr Mehta for the State, besides supporting the emphasis placed by the High Court on the words 'in respect of', contended that that construction could be supported in view of the provisions of sub-section (3) of section 18 which is in these terms

TABLE OF CASES REPORTED.

SUPREME COURT OF INDIA.

PAGES

Baswabhusan Naik v The State of Orissa	(S C.) 537
Commissioner of Income-Tax Bombay v Ogale Glass Works, Ltd	(S C.) 522
Gopalan v State of Madhya Pradesh	(S C.) 534
Kiran Singh v Chaman Paswan	(S C.) 514
Kishan Lal v Bhanwar Lal	(S C.) 542
M M Shah v Sayed Mahmud	(S C.) 509
State of M P v Mandawar	(S C.) 503
Tolaram Relumal v State of Bombay	(S C.) 547

INDEX TO REPORTS.

Bombay Rent Restriction Act (LVII of 1937), section 18 (1)—Executory agreement to lease premises under construction—Acceptance of consideration—If offence—Interpretation of statutes—Construction of penal provision—Duty of Court (S C.) 547

Civil Procedure Code (V of 1908) Order 21 rules 72 84 85, and 86—Scheme of—Nature of the provisions directory or mandatory—Failure of auction purchaser to deposit amount—Effect—Wrong order allowing set-off to mortgagee purchaser who had not sued for or obtained a decree—Effect (S C.) 509

Criminal Procedure Code (V of 1898) section 14—Appointment of Special Magistrate under—If discriminatory and hit by Article 14 of the Constitution of India (1950)—Sanction to prosecute under section 197 (1) Criminal Procedure Code (V of 1898)—Essentials—If should specify the Court before which trial is to be held (S C.) 534

Defence of India Rules (as applied to Marwar) Rule 90 (c) (2)—Prohibition against entering into forward contracts of option in bullion—Suit by agent claiming indemnity against the principal for loss sustained in carrying out directions of the principal in respect of such contracts—If hit by rule 90 (c) (2) (S C.) 542

Fundamental Rules—Rule 44—Grant of dearness allowance under—If can be enforced by Government servant by mandamus—Different rates of dearness allowances to servants under State and Central Governments—If discriminatory and void—Constitution of India (1950) Articles 14 and 226 (S C.) 503

Income tax Act (XI of 1922) section 4 (1) (a)—Assessee non resident company supplying goods within British India—Posting of cheques in British India and receipt of cheques out of—If income received within British India so as to be liable to assessment of income-tax—Cheque—How far payment (S C.) 522

Prevention of Corruption Act (II of 1947) section 5—Offences under—Sanction to prosecute—If should be in any particular form or set out the facts in respect of which it is given—Presumption under section 5 (2)—Scope—Charge and sanction—Absence of particulars in—Effect (S C.) 537

Suits Valuation Act (VII of 1887), section 11—Scope and effect—Court entertaining a suit or appeal over which it has no jurisdiction by reason of over valuation or under valuation—Effect—“Prejudice” in section 11—Meaning of (S C.) 514

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CONTENTS

				PAGES.
Articles 151—154
Reports 551—648

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[XVII]

AMERICAN BORROWINGS IN THE INDIAN CONSTITUTION

BY

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One of the most recent Constitutions of the world is the Indian Constitution. Unlike many other leading Constitutions of the world, our Constitution was not framed in the heat and turmoil of any revolution or rebellion. The Constitution of India emerged in its present form after mature consideration and elaborate discussion by the flower of the nations' intellects. The framers of the Indian Constitution had the benefit of perusing the provisions and observing the working of the several existing Constitutions. Our Constitution is a synthesis of the ideas of several Constitutions of the world and it is the purpose of this short article to trace the American content of Constitution in the framework of our Constitution.

PREAMBLE

The first thing that will impress even the most casual observer of the Constitution is the Preamble. At one time it was customary to fill in the Preamble with glowing passages in verbose language expatiating on the ideals and aims of the Constitution. The Preamble to the Indian Constitution whereby the sovereign rights are all vested in the people of India takes its inspiration from its American counterpart. Note the close similarity: "We the people of the United States do ordain and establish this Constitution for the United States of America" and "We the people of India do hereby enact and give to ourselves this Constitution." As in the United States, our Constitution is the fundamental law of our land and the source of all power and professes to be founded on the consent and acquiescence of the people.

FUNDAMENTAL RIGHTS

Fundamental rights are the protective rights of the citizen against possible executive or legislative excesses. The first ten amendments to the American Constitution popularly known as the Bill of Rights enshrines the most sacrosanct principles of liberty and justice. Part III of our Constitution enumerates the "fundamental rights" of the people of India. For better appreciating the nature and purpose of these rights, so zealously treasured by the people, a brief discussion of its history against the English and American backgrounds is necessary. Great Britain has no Constitution and as Lord Wright observed in *Liversidge v. Anders* 1: "The

safeguard of British liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved." The system of parliamentary sovereignty evolved in England is an effective check on executive excesses, but there is no check against parliamentary tyranny. The framers of the American Constitution who had been the victims of British parliamentary autocracy thought that there should be safeguards both against executive and legislative despotism. The Constitution of India attempts to strike a balance between these two schools of thought and thus we find Articles 14, 15, 17, 18, 20 and 24 limiting both executive and legislative actions following the American pattern and Articles 21, 22 and 31 binding only the executive. Article 19 popularly known as the seven freedoms clause stands on a separate footing.

ARTICLE 19

In Article 19 we find the greatest amount of importation from American Constitution. In this Article there is a partial adoption of the principles of the Doctrine of 'Police Powers' and the Doctrine of Judicial Review. By "Police Power" is meant the inherent power of the State to impose restrictions on the fundamental inviolable rights of the citizen. The doctrine is founded on the theory that "the whole is greater than the sum total of the parts, and when the individual health, safety and welfare are sacrificed or neglected the State shall suffer", *Holden v Hardy*¹. But in this connection it will not be out of place to remember the observation of our Supreme Court in *Charanlall Choudhry v Union of India*² that the provisions of our Constitution should be interpreted by the plain words of our Constitution and not with reference to the connotation of "Police Power" in American Constitutional Law.

The sub clauses to Article 19 have been widely amended by the Constitution of India (First Amendment) Act of 1951. These Amendments made even before the ink in which the Constitution was inscribed was hardly dry has been viewed with grave circumspection and casts doubts on the fundamentality of our Fundamental Rights. But that is a different matter. By the introduction of the word "reasonable" in those clauses the framers of our Constitution intended to give effect to the Doctrine of Judicial Review expounded by the Judges of the Supreme Court of America whilst interpreting the "Due Process" clause of the 5th and 14th Amendments to the American Constitution. Patanjali Sastri, C.J., declares in emphatic language in the *State of Madras v V G Row*³, that "our Constitution contains express provisions for Judicial Review of legislation as to its conformity with the Constitution". Further the Supreme Court has held in *Dr N B Khare v State of New Delhi*⁴, that both the substantive and procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness. By adopting this view the Judges of the Supreme Court of India have given unreserved recognition to the Doctrine of Judicial Review.

ARTICLE 14

Article 14 of our Constitution is a mixture of Irish and American ideas. The words "equal protection of the laws" is borrowed from section 1 of the 14th Amendment to the American Constitution. This Article aims to accord equality of legal status to all persons within the territory of India. The expression "equality before

1 (1896) 169 U.S. 365

2 (1951) S.C.J. 29 (S.C.)

3 (1952) S.C.R. 507 1952 S.C.J. 253

(1952) 2 M.L.J. 135 (S.C.)

4 (1950) S.C.J. 519

law" which is of Irish import puts the emphasis on the negative concept of the absence of any special privilege in favour of an individual while the expression "equal protection of laws" stresses the positive concept of equality of treatment in equal circumstances. In the leading case *Tid W'o v Hopkins*¹, Justice Mathews observed that by this maxim of Constitutional law the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions are treasured

ARTICLE 18

Article 18 of our Constitution which deals with abolition of titles has a parallel in Article 1, section 9, sub section 7 of the American Constitution

ARTICLE 20

Article 20 (1) of our Constitution prohibits *ex post facto* laws. The framers of the Constitution must have been inspired by Article 1 section 9 sub section 2 of the American Constitution. Article 20 (2) which deals with "Double Jeopardy" seems to give effect to Justice Buller's rule postulated in *Rex v Vandercornb and Abbot*², which has been cited with approval by the American Supreme Court in *Morgan v Devire*³ and *Carter v Maccaughey*⁴. Clause 3 of Article 20 of our Constitution is borrowed from the 5th Amendment which declares 'nor shall be compelled in any case to be a witness against himself'

In conclusion it must be noted that our Fundamental Rights are those that have been expressly enumerated in Part III of the Constitution and no other. In sad contrast one turns to the 9th Amendment to the American Constitution which declares "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"

EMERGENCY PROVISIONS

Part XVIII of the Indian Constitution deals with emergency provisions. Article 352 postulates that the President can make a proclamation that a grave emergency exists when the security of India is threatened by War or Rebellion. Under Article 358 the rights enjoyed by the citizen under Part III can be suspended during such emergent situation. Article 1, section 9 sub section 2 of the American Constitution runs thus 'the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it'. One finds a close similarity in the reasons for the suspension of the rights in both the Constitutions.

PRESIDENT

The Office of the President is a high office and therefore as in America our Constitution also fixes the age limit of a person entitled to hold that office at thirty-five. Following Article 11 section 1 of the American Constitution, Article 53 (1) of our Constitution vests the executive power of the Union in the President. But unlike the American Constitution this vesting is saddled with a condition that such power shall be exercised by him either directly or through offices subordinate to him in accordance with the Constitution. The President under the United States Constitution wields a lot of power while the President under the Indian Constitution is a mere titular head. The powers of the President are "cribbed, cabined and confined" and he is as impotent as the King of England. The form of the oath

¹ (1855) 113 U.S. 356

² (1796) 2 Leach C. C. 708

³ 237 U.S. 632

⁴ 183 U.S. 363.

of the President prescribed in Article 60 of our Constitution closely follows the form enumerated in the last clause to section 1 of Article 1 of the American Constitution. Dereliction of duty on the part of the President is visited by the quasi-judicial penalty of impeachment as in America.

Article 59 (4) of the Constitution follows Article 11, section 1 of the American Constitution, the only difference being that under the Indian Constitution the prohibition is only against a decrease in the President's salary. Article 72 of our Constitution which enumerates the President's powers to grant pardons, etc., is inspired by Article 11, section 2 of the American Constitution.

SEPARATION OF POWERS

The Doctrine of separation of powers is as old as Montesquieu. The Doctrine has undergone several changes since its first statement of it by Montesquieu and it has now come to mean that one organ of Government should not essentially usurp the functions that belong to another. This doctrine is recognised by the American Constitution by Article 1, section 1, vesting the legislative power in the Congress of the United States and by Article 11, section 1 vesting the executive power in the President and by Article 111, section 1, vesting the judicial power in the Supreme Court. Though Article 53 of the Indian Constitution vests the executive power of the Union in the President there are no corresponding provisions with respect to legislative and judicial functions. It should not anyway be understood that there is no differentiation between the functions of the different organs in the Indian Constitution. In *Special reference case*¹ their Lordships of the Supreme Court opined that though our Constitution does not vest the Legislative and Judicial powers in the Legislature and Judiciary respectively in express terms, being a written Constitution, the functions and powers of each must be found in the Constitution.

These in short are the Indian borrowings from the American Constitution.

or continuance of a lease" envisages the existence of a lease and the payment of an amount in respect of that lease or with reference to that lease. Without the existence of a lease there can be no reference to it. If the Legislature intended to punish persons receiving puggree on merely executory contracts it should have made its intention clear by use of clear and unambiguous language.

The construction we are placing on the section is borne out by the circumstance that it occurs in Part II of the Act. Section 6 of this Part provides that "in areas specified in Schedule I, this Part shall apply to premises *let* for residence, education, business, trade or storage." This Part relates to premises *let*, in other words, premises demised or given on lease and not to premises that are promised to be given on lease and of which the lease may or may not come into being. The definition of the expression 'landlord' also suggests the same construction. "Landlord" as defined in section 5 of the Act means "any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit, of any other person, or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant." It is obvious that on the basis of an executory agreement the appellants would not be entitled to receive any rent. They would only be entitled to receive rent after the lease is executed and actual demise of the premises or their transfer is made in favour of the complainant. The definition of the expression 'tenant' also suggests the same construction.

Mr Mehta for the State, besides supporting the emphasis placed by the High Court on the words "in respect of", contended that that construction could be supported in view of the provisions of sub-section (3) of section 18 which is in these terms:

"18 (3) Nothing in this section shall apply to any payment made under any agreement entered into before the first day of September 1940, or to any payment made by any person to a landlord by way of a loan for the purpose of financing the erection of the whole or part of a residential building or a residential section of a building on the land held by him as an owner, a lessee or in any other capacity entitling him to build on such land under an agreement which shall be in writing and shall notwithstanding anything contained in the Indian Registration Act 1908, be registered. Such agreement shall *inter alia* include the following conditions, namely:—

(i) that the landlord is to let to such person the whole or part of the building when completed for the use of such person or any member of his family.

It was suggested that but for this exception the executory agreement would be included within the mischief of section 18 (1) and that unless such agreements were within the mischief of the section there would have been no point in exempting them from its provisions. In our view, this contention is not sound. In the first place, the exception was added to the section by Act XLII of 1951 subsequent to the agreement in question, and for the purposes of this case section 18 (1) should ordinarily be read as it stood in the Act, at the time the offence is alleged to have been committed. Be that as it may, it appears that sub-section (3) was added to the section by reason of the fact that some courts construed section 18 (1) in the manner in which it has been construed by the Full Bench in this case, and the Legislature by enacting clause (3) made it clear that agreements of the nature indicated in the sub-section were never intended to be included therein. In our opinion, the language of that section is not of much assistance in construing the main provisions of section 18 (1).

The result therefore is that in our view the receipt of money by the appellants from the complainant at the time of the oral executory agreement of lease was not made punishable under section 18 (1) of the Act and is outside its mischief, and the Presidency Magistrate was in error in convicting the appellants and the High Court was also in error in upholding their conviction. We accordingly allow this appeal, set aside the conviction of the appellants and order that they be acquitted.

Agent for Respondent *R H Dhebar*

Appeal allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN, Chief Justice, VIVIAN BOSE AND GHULAM HASAN, JJ

Shankar Sitaram Sontakke and another

*Appellants**

v

Balkrishna Sitaram Sontakke and others

Respondents

Civil Procedure Code (v of 1908) sect 11 and Order 2 rule 2—Applicability—Part son suit—Compromise providing for taking of accounts upto a certain date of the various businesses belonging to the family—Some businesses carried on by some of the parties even after that date—Subsequent suit claiming accounts of such business—Bar of

Where a suit for partition of joint family businesses was compromised the parties agreeing to confine the taking of all accounts upto 31st March 1946 if the compromise was arrived at after full consideration by the parties and was not vitiated by fraud misrepresentation mistake or misunderstanding the matter once concluded between the parties who were dealing with each other at arms length cannot be reopened. Where a motor bus business of the family continued to be carried on after the crucial date fixed in the compromise it is not open to the plaintiff to ask for accounts of such subsequent period by a new suit.

The plaintiff is barred by the principle of *res judicata* from re-agitating the question in the subsequent suit. The compromise decree has the binding force of *res judicata*.

The claim is also barred by the provisions of Order 2 rule 2 (3) of the Code of Civil Procedure. The plaintiff by confining his claim to account in the prior suit upto March 31, 1946 only implicitly if not explicitly relinquished his claim to the account for the subsequent period. The cause of action in the first suit was the desire of the plaintiff to separate from his brothers and to divide the joint family property. That suit embraced the entire property without any reservation and was compromised the plaintiff having abandoned his claim to account in respect of the motor business subsequent to March 31 1946. His subsequent suit to enforce a part of his claim is founded on the same cause of action which he deliberately relinquished. The second suit is accordingly barred under Order 2 rule 2 (3) of the Civil Procedure Code.

On Appeal from the Judgment and Decree, dated the 25th day of March 1952, of the High Court of Judicature at Bombay (Bavdekar and Drut, JJ) in Appeal No 554 of 1951 from Original Decree arising out of the Judgment and Decree, dated the 30th day of June, 1951, of the Court of the Joint Civil Judge, Senior Division of Thana, in Special Suit No 12 of 1949.

K S Krishnaswami Iyengar, Senior Advocate, (*J B Dadachani* and *Ganpat Rai*, Advocates, with him) for Appellants

S B Jathar, *R B Kotwal* and *Naumt Lal*, Advocates for Respondent No 1.

The Judgment of the Court was delivered by

Ghulam Hasan, J —This appeal is brought by leave of the High Court of Bombay against the judgment and decree of a Division Bench of that court (Bavdekar and Dixit, JJ) dated March 25, 1952, modifying the judgment and decree of the Civil Judge, Senior Division of Thana, dated 30th June, 1951

The appeal arises out of a partition between 6 brothers of a joint Hindu family. The joint family carried on joint family business of a grocery shop, liquor shops, a ration shop, a motor-bus service and also money-lending under the name of "Sontakke Brothers". The family also possessed immovable and movable property. Balkrishna Sitaram Sontakke is the eldest of the brothers and is the plaintiff respondent in the present appeal. He will be referred to hereafter as the plaintiff.

It is common ground that up to 1944 the brothers were living and messing together and the income from the family business used to be kept with the plaintiff. From 14th April, 1945 the situation changed and the parties began to appropriate the proceeds of the various businesses carried on by them separately to themselves. The plaintiff was running the liquor shops, defendants 1 and 2, who are the appellants, were carrying on the motor bus service business while defendant 4 was running the grocery shop. The parties tried to have partition effected between them through arbitrators but the attempt failed. On 29th June, 1945, all the five brothers filed a suit for partition against the plaintiff of all joint family properties including the accounts of all the businesses. The suit was numbered 39 of 1945. It was compromised on 7th March, 1946. By this compromise it was declared that prior to 1942 all the accounts of the various businesses had been correctly maintained and shown, that the parties had agreed to have arbitrators appointed through Court for examining the accounts from 1942 up to 31st March, 1946, and for determining the amount due up to that date. Each of the brothers was to get one sixth share in the cash balance as found on 31st March, 1946, upon examination of accounts by the arbitrators. All the movable property of the joint family including the stock in trade of all the family businesses was to be divided equally among all the brothers. The compromise further declared that the plaintiff was to have one sixth share in the motor garage and that defendants 1 and 2 were to pay the price of one sixth share to him. These are the material provisions of the compromise. One of the brothers was a minor and the Court finding the compromise to be for the benefit of the minor accepted it and passed a preliminary decree in terms of the compromise on 25th July, 1947. If nothing else had happened to disturb the natural course of events, the proceedings would have ended in a final decree for partition. The plaintiff, however, commenced a fresh suit on 23rd February, 1949, confining his relief to his share of the profits and assets of the motor business carried on by defendants 1 and 2 after 31st March 1946. His case was that the compromise was made in a hurry, that the parties omitted to provide in the compromise about the future conduct of the motor business from 1st April, 1946, that the motor business was still a joint family business and that he had a right to ask for accounts of that business subsequent to 31st March, 1946.

In defence it was pleaded that the compromise was made after due deliberation, that accounts of the motor business and the grocery shop should actually have been taken up to 14th April, 1945, the date of disruption of the joint family status, but the parties agreed by way of compromise that account of all family businesses should be taken up to 31st March, 1946. It was also pleaded that the claim was

barred by *res judicata* Upon the issues framed in the case the Civil Judge found that the suit was not barred by reason of the decision in the previous suit No 39 of 1945, that the decision in that suit was not obtained by fraud and misrepresentation and that the compromise in the previous suit was not due to a mistake or misunderstanding. Despite these findings, the Civil Judge held that although the motor business carried on after the partition had ceased to be a joint family business yet as it was carried on by some members of a family their position was analogous to that of a partner carrying on partnership after dissolution and applying the principle underlying section 37 of the Partnership Act he held that the two brothers carrying on the motor business were liable to account. Accordingly he passed a preliminary decree directing the accounts of the motor business to be taken from 31st March, 1946, up to the date on which a final decree for payment of the amount found to be due would be made. A commissioner was appointed to take the accounts to ascertain the profits earned by the use of the capital belonging to the shares of brothers other than those who carried on the motor business. In appeal Bavdekar, J., with whom Dixit, J., agreed modified the decree of the trial court by directing that the accounts were to be taken up to the date when the businesses discontinued and not up to the date of the final decree.

The learned Judges held that the cause of action for the present suit was different from the cause of action in the previous suit and that the suit was not barred by *res judicata* or by Order 2, rule 2 of the Code of Civil Procedure. After delivering themselves of some conflicting observations to which reference will in detail be made hereafter they held that the consent decree did not expressly negative the right for accounts of the motor transport business. Finally the learned Judges recorded the conclusion that regardless of the pleadings in the case the defendants 1 & 2 had made use of the joint family property and that they stood in the position of co-owners and as contemplated in section 90 of the Indian Trusts Act were liable to render accounts for the profits which were attributable to the employment of the assets owned by the parties jointly.

Learned counsel for the appellants has contested the view of the High Court upon all the points decided against them. He has contended that the cause of action in a suit for partition is the desire and intention of the family to separate, that the cause of action in the two suits is identically the same and not separate and distinct and that the suit was, therefore, barred both by the principle of *res judicata* and by Order 2, rule 2, of the Civil Procedure Code. Learned counsel also challenged the view of the High Court about the applicability of section 90 of the Indian Trusts Act.

It seems to us that upon a fair reading of the compromise arrived at between the parties in the circumstances then existing, the only legitimate conclusion possible is that the parties had agreed to confine the taking of all accounts up to 31st March, 1946, and had closed the door to reopening them beyond that date. If the compromise was arrived at after full consideration by the parties and was not vitiated by fraud, misrepresentation, mistake or misunderstanding as held by the trial Court—a finding which was not interfered with by the High Court—it follows that a matter once concluded between the parties who were dealing with each other at arm's length cannot now be reopened. What led the parties to confine the period of account to 31st March, 1946, and stop further accounting which would have normally extended to the passing of the final decree will appear from the following

circumstances The plaintiff knew that the licence for the liquor shops carried on by him was expiring on the 1st April, 1946 and he was anxious to run the liquor business exclusively and not jointly or in partnership with his brothers after the expiry of the licence He gave a notice to his brothers through Pleader on 12th December, 1945, stating *inter alia* the following —

‘The period of (licence for) the liquor shops at the said places expires by end of March 1946 Hence after the expiry of the said period my client having no desire to conduct liquor shop business jointly or in partnership with any of you again he intends to run and will run as from the date 1st April 1946 one or more liquor shops as he pleases belonging to him alone independently The moneys that will be required for (purchase in) auction of the shops will be paid by my client by borrowing the same from third parties on his own responsibility and my client will not allow the said moneys to have the least connection with the businesses properties and cash which are at present in dispute in court and with the profits and income from the said businesses or properties My client expressly informs you by this notice of the fact that the liquor shops thus purchased by him will solely belong to him and will be run by him independently of any of you None of you will have any legal right to meddle with or interfere in the liquor shops which will be thus purchased by my client in the Government auction for the new year beginning from 1st April 1946 and if any of you make an attempt with malicious intention to cause even the slightest interference in the said business of my client then my client will hold you fully responsible for any harm suffered by him and for other damages and expenses incurred by him and will take a severe legal action against you therefor

This notice furnishes a true guide as to the intention of the plaintiff which was none other than that he should run the liquor shops exclusively for himself and appropriate the profits thereof without making himself accountable to his brothers Although the plaintiff says that he intended to pay for the auction of liquor shops by borrowing he was really in a position of vantage for he admittedly had Rs 13 000 cash in hand as against the Rs 3 000 his brothers had The notice explains the significance of the provision in the compromise that accounts are to be taken only up to 31st March, 1946 Since the plaintiff did not want his brothers to interfere with his exclusive running of the liquor business after 31st March, 1946, he perforce had to agree that he should sever his connection with other businesses run by his brothers This arrangement was apparently acceptable to all the brothers as being fair and reasonable and as not giving undue advantage to any party over the other This being our construction of the compromise it follows that the plaintiff's conduct in going back upon that arrangement by filing a fresh suit in regard to the motor business only is anything but honest The plaint filed in the previous suit leaves no manner of doubt that the plaintiffs in that suit sought a complete division of all the family property both movable and immovable and a final determination of all the accounts in respect of the family businesses It is also significant that after the compromise the plaintiff (Balkrishna) filed an application before the Civil Judge in which he alleged that when he agreed in the compromise that the accounts of the various businesses should be up to the 31st March, 1946 he was under a misapprehension regarding his legal right inasmuch as he thought that when the accounts were to be taken up to a certain date, the joint family property after that date would not be allowed to be utilized by some members only of the family for making profits for themselves to the exclusion of the plaintiff He goes on to say that he laboured under the impression that the joint family business would be either altogether stopped after the 31st March, 1946, or would be run either by the arbitrators or the Commissioners and the profits accruing therefrom would be deposited in court for distribution among the parties according to their shares This application was made on 22nd November, 1947 His Pleader, however, stated on 6th April, 1948 “The application is abandoned by the applicant as he

wishes to pursue his remedy by way of an independent suit for the grievance in the application", and the court passed the order "The application is disposed of as it is not pressed." The learned Judges of the High Court in referring to this application observe thus

"It is obvious therefrom that really speaking the idea of the profits of several businesses after the 1st of April 1946 was present to the minds of the parties, but the parties did not care to ask that accounts of the other businesses will be taken up after the 1st of April, 1946. One of the businesses was a liquor business which admittedly was to come to an end on the 31st of March 1946 but there was also another business that was a Lurana shop which was not a very big business. But all the same it was there and there is force therefore, in the contention which has been advanced on behalf of the appellants that it was not as if there has been an oversight on the part of the parties but the parties knew that the businesses might go on afterwards, but if they were carried on they did not particularly care for providing by the compromise decree for accounts of those businesses being taken after the 1st of April 1946.

Having said all this they record the conclusion that the compromise did not expressly negative the right of the plaintiff to an account of motor business. We are unable to accept this conclusion. The observations quoted above negative the plaintiff's case about mistake or misunderstanding in regard to the true effect of the compromise and show that the plaintiff abandoned the right to account after the crucial date and the status of the parties thereafter changed into one of tenants in common. If the plaintiff really intended that accounts of the motor business or indeed of all other businesses were to be taken up to the date of the final decree there was no point in mentioning the 31st March, 1946. The normal course after the preliminary decree was passed by the Court, was to divide all the property by metes and bounds and to award monies as found on examination of the accounts right up to the date of the final decree. But for the compromise which limited the period of the account the plaintiff would have obtained the relief he is now seeking in the partition suit as accounts would have been taken of all the businesses up to the date of the final decree. The plaintiff has himself to thank for preventing the natural course of events and for forbidding the accounts to be taken after the 31st March, 1946. The plaintiff on the other hand has no real grievance in the matter, for although the defendants 1 & 2 who continued to run the motor business, may have made some money with the help of the two old motor buses, the plaintiff whose keenness to run the liquor business is apparent from the notice referred to above was not precluded from reaping the fruits of that business. It is hard to conceive that the plaintiff would have agreed to share his burden of the loss if the motor business has sustained any. We hold, therefore, that the compromise closed once for all the controversy about taking any account of the joint family businesses including the motor business after the 31st March, 1946, and the plaintiff is bound by the terms of the compromise and the consent decree following upon it.

The obvious effect of this finding is that the plaintiff is barred by the principle of *res judicata* from re-agitating the question in the present suit. It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by *invitum*. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of *res judicata*.

We are also of opinion that the plaintiff's claim is barred by the provisions of Order 2, rule 2 (3) of the Code of Civil Procedure. The plaintiff by confining

his claim to account up to March 31, 1946, only implicitly, if not explicitly, relinquished his claim to the account for the subsequent period. Sub rule 3 clearly lays down that if a person omits, except with the leave of the Court, to sue for all reliefs to which he is entitled, he shall not afterwards sue for any relief so omitted. We do not agree with the High Court that the cause of action in the subsequent suit was different from the cause of action in the first suit. The cause of action in the first suit was the desire of the plaintiff to separate from his brothers and to divide the joint family property. That suit embraced the entire property without any reservation and was compromised, the plaintiff having abandoned his claim to account in respect of the motor business subsequent to 31st March, 1946. His subsequent suit to enforce a part of the claim is founded on the same cause of action which he deliberately relinquished. We are clear, therefore, that the cause of action in the two suits being the same, the suit is barred under Order 2 rule 2 (3) of the Civil Procedure Code.

As the suit is barred both by *res judicata* and Order 2, rule 2 (3) of the Civil Procedure Code, no further question as to the applicability of section 90 of the Indian Trusts Act can possibly arise under the circumstances.

The result is that we allow the appeal and dismiss the suit with costs throughout.

Appeal allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN, Chief Justice, VIVIAN BOSE AND GHULAM HASAN, JJ

Nathoo Lal

*Appellants**

Durga Prasad

Respondent

Hindu Law—O will bequeathing property to daughter—Gift executed by mother and widow of Testator in favour of the daughter to effectuate the oral will—If confers limited or absolute right in daughter

Constitution of India (1950) Article 133—Appellability—Decree of High Court of Rajasthan modifying decree of High Court of former Jaipur State—Right to leave to appeal

According to the law as understood at present where there are no express terms in a deed of gift by a donor having absolute rights there is no presumption one way or the other and there is no difference in the case of a male and the case of a female and the fact that the donee is a woman does not make the gift any the less absolute where the words would be sufficient to convey an absolute estate to a male. To convey an absolute estate to a Hindu female no express power of alienation need be given; it is enough if words are used of such amplitude as would convey full rights of ownership. It is clearly wrong to say that a will having been made by the father in favour of his daughter it should be presumed that he intended to give her a limited life estate.

Where the only operative decree in a suit was that of the Rajasthan High Court passed on 5th April 1950 modifying a decree passed by the High Court of the former Jaipur State the provisions of Article 133 are attracted to it and it is appealable to the Supreme Court provided the requirements of that Article are fulfilled. The Code of Civil Procedure of the Jaipur State making the decree of its High Court final could not determine the jurisdiction of the Supreme Court and has no relevancy to the maintainability of the appeal to the Supreme Court.

Appeal from the Judgment and Order, dated the 5th April 1950 of the High Court of Rajasthan at Jaipur in Case No. 24 of Samvat 2005 (Review modifying the Decree, dated the 3rd March, 1949 of the High Court of the former Jaipur State in Civil Second Appeal No. 187 of Samvat 2004 against the Decree, dated the 15th

April, 1948, of the Court of the District Judge, Jaipur City, in Civil Appeal No. 40 of Samvat 2004, arising out of the Decree, dated the 23rd August, 1947, of the Civil Judge, Jaipur City, in Suit No. 66 of Samvat 2002.)

Dr Bakshi Tek Chand, Senior Advocate, (*Rajinder Narain*, Advocate, with him) for Appellant

D M Bhandari, Senior Advocate. (*K N Agarwalla*, and *R N Sachthey*, Advocates, with him) for Respondent

The Judgment of the Court was delivered by

Mahajan C J—This is an appeal from the judgment and decree of the High Court of Judicature of Rajasthan, dated the 5th of April, 1950, modifying the decree of the High Court of the former Jaipur State, dated the 3rd March, 1949, on an application for review in a second appeal concerning a suit for possession of property.

The property in dispute originally belonged to one Ramachandra who died sonless in the year 1903. He was survived by his mother Sheokori, his widow Mst Badni and his two daughters, Bhuri and Laxmi. It is alleged that he made an oral will under which he bequeathed the property in dispute to his daughter Laxmi. On the 6th September, 1906, Mst Sheokori and Mst Badni purporting to act in accordance with the directions of the oral will, executed and registered a deed of gift of the property in dispute in favour of Mst Laxmi. The gift deed contains the following recitals—

These houses are made a gift to you according to the will of your father Ramachandra. In this way these houses belonging to us were purchased by your father Ramachandra and he in his last days having made a gift of these houses to you made a will to us that he had made a gift of that house to his daughter Laxmi and directed us to get the gift deed registered in her name. He further said that if we or our relations kinsmen creditors do raise any dispute with her he would Damang r hoonga catch hold of him by his garments. According to his aforesaid will, we have got this gift-deed executed in your favour while in best of our senses and in discharge of our sacred duty enjoined by Dharma. No other person except you has got any claim over the house. You deal with your house in any way you like. If anybody takes back the land gifted by himself or his ancestors he will live in hell as long as the sun and moon shine.

The scribe it seems, did not in appropriate language express the directions of the two widows and his ideas of the legal situation were somewhat confused but there can be no manner of doubt that the two executants were not conferring themselves any title which they had in the property on Laxmi but were merely giving effect to the oral will as executors and were putting the legatee in possession of the bequeathed property in this manner. That the widows had no title themselves is evident from the fact that Mst Sheokori also joined in executing the gift deed. Admittedly Ramachandra's estate could not devolve on her.

Bhuri, the second daughter, died in the year 1907, while Mst Badni, the widow, died in the year 1927. Mst Laxmi remained in possession of the property till her death in the year 1928. After her death Balabux, her husband, on the 5th of July, 1930, claiming as heir to her, mortgaged the house in dispute to the defendant-appellant Nathoo Lal and later on the 5th October, 1933, he sold it to him and put him into possession of it and since then he is in possession.

On the 4th October, 1945, that is one day before the expiry of the period of 12 years from the date of the defendant's entry into possession of the house, the plaintiff, son of Mst Bhuri, sister of Mst Laxmi, claiming as an heir to her estate, filed this suit *in forma pauperis* for possession of the house. He alleged that he was

in possession of the house till the 24th of August, 1933 through his tenant, that after it was vacated by the tenant he locked it and went away to his native village Harmara; and that on the 27th September, 1944, he came to know that the house had been taken possession of by the appellant during his absence. It was contended by him that Balabux had no right either to mortgage or sell the house and that Laxmi was not the absolute owner of the property but had only a limited estate in it, and on her death he was entitled to possession of it.

On the 28th of August, 1947 the suit was dismissed by the Civil Judge who held that Mst Laxmi became the absolute owner of the property and the plaintiff therefore had no title to claim possession of it after her death, Balabux being her stridhan heir. The learned Judge, however, held that the suit was within limitation. On appeal this decision was affirmed by the District Judge. He expressed the opinion that the widow in executing the deed of gift was only acting as an executrix of the oral will made by Ramchandra at his deathbed and that Laxmi got under this will an absolute estate in the suit property. The plea of limitation raised by the defendant was negatived on the finding that the plaintiff was in possession of it within twelve years of the suit.

Plaintiff preferred a second appeal to the High Court of Jaipur and this time with success. The High Court held that after the death of Laxmi the plaintiff continued in possession of the house till he was dispossessed by the defendant on the 5th of October, 1933 and that he was in possession even during her lifetime. On the main question in the case the High Court held that though the house was bequeathed to Laxmi by Ramchandra under an oral will, there was no proof that it conferred upon her an absolute interest in the property and that in the absence of any evidence indicating that the donor intended to convey an absolute interest to her, the gift being in favour of a female could only confer upon her a limited life estate and on her death it would revert to the donor's heirs and the plaintiff being such an heir was entitled to succeed. In the result the appeal was allowed and the plaintiff's suit was decreed with costs throughout.

The defendant applied for a review of this judgment. Meanwhile the Jaipur High Court had become defunct and the review was heard by the Rajasthan High Court as successor to the Jaipur High Court under the High Courts Ordinance and was partially allowed on the 5th of April 1950 and the decree was accordingly amended and it was provided therein that the plaintiff shall not be entitled to possession of the house except on payment of Rs 4,000 to the defendant as costs of improvements and repairs. It is against this judgment and decree passed after the coming into force of the Constitution of India that the present appeal has been preferred to this Court by leave of the Rajasthan High Court under Article 133 (1) (c) of the Constitution.

The learned counsel for the respondent raised a preliminary objection as to the maintainability of the appeal. He contended that according to the Code of Civil Procedure of the Jaipur State the decision of the Jaipur High Court had become final as no appeal lay from it and hence this appeal was incompetent. It was argued that the proceedings in the suit decided in 1945, had concluded by the decision of the High Court given in 1949, and the review judgment which modified the decree in regard to improvements, could not entitle the appellant to reopen the decision of the High Court of Jaipur given in 1949.

In our opinion, this objection is not well founded. The only operative decree in the suit which finally and conclusively determines the rights of the parties is the decree passed on the 5th of April, 1950, by the Rajasthan High Court and that having been passed after the coming into force of the Constitution of India, the provisions of Article 133 are attracted to it and it is appealable to this Court provided the requirements of that Article are fulfilled. The Code of Civil Procedure of the Jaipur State could not determine the jurisdiction of this Court and has no relevancy to the maintainability of the appeal. The requirements of Article 133 having been fulfilled, this appeal is clearly competent.

The learned counsel then contended that the High Court was in error in granting the certificate in this case. We are unable to agree. An inquiry was made into the valuation of the property and it was reported that its value was Rs. 20,000 or that the decision affected property of the value of above Rs. 20,000. A substantial question of law was involved in the case, that is, whether a testamentary disposition by a Hindu in favour of a female heir conferred on her only a limited estate in the absence of evidence that he intended to confer on her an absolute interest in the property. In these circumstances the High Court was fully justified in granting the certificate. We ourselves would have been prepared to admit this appeal under our extraordinary powers conferred by Article 136 (1) of the Constitution if such a certificate had not been given in the case. For the reasons given above we see no force in either of these two preliminary objections which we overrule.

Dr. Bakshi Tek Chand for the appellant contended that the courts below were in error in holding that the plaintiff's suit was within limitation. He urged that in order to bring the suit within limitation the plaintiff in para 5 of the plaint alleged that after the death of Laxmi he kept tenants in the house, realised the rent and enjoyed it and that the last tenant vacated on the 24th August, 1933 and thereafter he went to his native place after locking the house, but that this allegation had not been made good by him, and as there was no evidence that he locked the house, it should be held that plaintiff's possession discontinued with effect from the 24th August, 1933 and hence his suit brought more than twelve years from that date was not within time.

It has been found by the courts below that the plaintiff was in possession of this house even during the lifetime of Laxmi and continued in possession thereafter. Even if the tenant vacated the house on the 24th August, 1933 and the plaintiff did not lock it, his possession would be presumed to continue till he was dispossessed by someone. The law presumes in favour of continuity of possession. The three courts below have unanimously held that on the evidence it was established that after the death of Laxmi plaintiff continued in possession of the house and the suit was within limitation. There are no valid grounds for reviewing this finding in the fourth Court and the contention is therefore negatived.

Dr. Bakshi Tek Chand next contended that Laxmi acquired an absolute title in the suit property under the will of her father and that the High Court was in error in holding that unless there were express words indicating that the donor who had absolute interest in the gifted property intended to convey an absolute interest to her, the gift in favour of an heir who would ordinarily inherit a limited interest could not be construed as conferring an absolute interest. The learned counsel for the respondent on the other hand raised two contentions. He urged in the first instance that it seems that the intention of Ramachandra was to make a gift of the

suit property in favour of Laxmi but he was unable to perfect the gift by executing a registered deed, being on his death bed and in that situation the property devolved on his widow by inheritance and it only came to Laxmi under the widow's gift and under it she could not get a larger interest than what the widow herself possessed, namely, a limited life estate, which terminated on her death. In the alternative, it was said that there was no evidence as to the terms of the oral will and that being so, the gift being in favour of a female heir, the presumption in the absence of evidence to the contrary was that the donee got only a limited life interest in the bequeathed property.

In our judgment there is force in the contention of Dr Tek Chand and none of the contentions raised by the respondent's counsel have any validity. That Ramachandra bequeathed the suit property and did not gift it to his daughter Laxmi is a fact which cannot be questioned at this stage. It was admitted by the plaintiff himself in the witness box. This is what the said —

Ramachandra had made a will in favour of Mst Laxmi and in that connection my maternal grandmother and maternal great grandmother got the gift deed registered. This very gift deed was got executed by my maternal grandmother and maternal great grandmother and had got it registered. Through this gift deed Mst Laxmi held possession over it till she was alive. She had kept deposit as her son and so she got the rent notes executed in my name.

What is admitted by a party to be true must be presumed to be true unless the contrary is shown. There is no evidence to the contrary in the case. The gift deed fully supports the testimony of the plaintiff on this point. It definitely states that according to the will the gift deed was executed in favour of Laxmi and it further recites that Laxmi was entitled to deal with the house in any manner she liked. Those who were directed to execute the oral will made by Ramachandra must be presumed to have carried out his directions in accordance with his wishes. It seems clear that the intention of the testator was to benefit his daughter Laxmi and to confer upon her the same title as he himself possessed. She was the sole object of his bounty and on the attendant circumstances of this case it is plain that he intended to confer on her whatever title he himself had. Laxmi therefore became the absolute owner of the property under the terms of the oral will of her father and the plaintiff is no heir to the property which under the law devolved on Laxmi's husband who had full right to alienate it.

We are further of the opinion that the High Court was in error in thinking that it is a settled principle of law that unless there are express terms in the deed of gift to indicate that the donor who had absolute interest intended to convey absolute ownership, a gift in favour of an heir who inherits only a limited interest cannot be construed as conferring an absolute interest. It is true that this was the principle once deduced from the Privy Council decision in *Mahomed Shamsool v Sheul Ram*¹ wherein it was held that a bequest to a daughter in law passed a limited estate. The proposition laid down in *Mahomed Shamsool's case*¹, was construed by the High Courts in India to mean that a gift of immovable property to a woman could not be deemed to confer upon her an absolute estate of inheritance which she could alienate at her pleasure unless the deed or will gave her in express terms a heritable estate or power of alienation. Later decisions of the Judicial Committee made it clear that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms. *Shamsool's case*², has been examined in recent years in

some High Courts and it has been observed that according to the law as understood at present there is no presumption one way or the other and there is no difference between the case of a male and the case of a female, and the fact that the donee is a woman does not make the gift any the less absolute where the words would be sufficient to convey an absolute estate to a male (see *Nagammal v Subbalakshmi Amma*¹). The matter has now been set at rest by the decision of this Court in *Ram Gopal v Nand Lal*². In this case it was observed as follows —

It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property unless such power is expressly conferred upon her. The reasoning adopted by Master J. of the Calcutta High Court in *Mit Kallan Kuar v Lachmi Paur*³ which was approved of and accepted by the Judicial Committee in a number of decisions seems to me to be unassailable. It was held by the Privy Council as early as in the case of *Tagore v Tagore*⁴ that if an estate were given to a man without express words of inheritance it would in the absence of a conflicting context carry, by Hindu law, an estate of inheritance. This is the general principle of law which is recognized and embodied in section 8 of the Transfer of Property Act and unless it is shown that under Hindu Law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a widow's estate there is no justification for departing from this principle. There is certainly no such provision in Hindu Law and no text could be supplied in support of the same.

The position therefore is that to convey an absolute estate to a Hindu female no express power of alienation need be given. It is enough if words are used of such amplitude as would convey full rights of ownership.

The learned Judges of the High Court were therefore clearly wrong in law in holding that the will having been made by the father in favour of his daughter, it should be presumed that he intended to give her a limited life estate.

For the reasons given above we allow the appeal, set aside the decree of the High Court decreeing the plaintiff's suit and restore the decree of the trial court dismissing the plaintiff's suit. In the circumstances of this case we will make no order as to costs.

Appeal allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT — B. K. MUKHERJEE, VIVIAN BOSE, GHULAM HASAN AND T. L. VENKATARAMA AYYAR, JJ

Gopal Singh and others

*Appellants**

Ujagar Singh and others

Respondents

Custom (Punjab)—Jats—Succession—Non-ancestral properties—Daughter preferred to collaterals—Daughter can get the property to her sons and accelerate the succession

In regard to the acquired property of the father, the daughter is preferred to the collaterals. Among the agricultural Jats the daughter takes the property not as a limited heir. If she has sons the estate will descend to them and their lineal male issue, in the usual way. A gift of such property by the daughter to her sons will accelerate the succession and the reversioners have no claim to such an estate.

Appeal from the Judgment and Decree, dated the 27th June, 1950, of the High Court of Judicature of Patiala and East Punjab States Union in Second Appeal

* Civil Appeal No. 174 of 1952

2nd April, 1954

1 (1917) 1 M.L.J. 64

3 (1875) 24 W.R. 395

2 (1950) S.C.J. 575 A.I.R. 1951 S.C. 139

4 (1872) 9 Beng.L.R. 377 (P.C.)

(S.C.)

No 219 of 1949 so against the Judgment and Decree, dated the 21st September, 1949, of the Court of the Additional District Judge, Bhatinda, in Appeal No 61 of 1948, arising from the Judgment and Decree, dated the 10th August 1948, of the Court of the Sub Judge, II Class, Mansa, in Case No 134 of 1947

Gopal Singh and Sardar Singh, Advocates for Appellants

Achhru Ram, Senior Advocate and A. L. Mehtani, Advocate for Respondents

The Judgment of the Court was delivered by

Bose, J—The plaintiffs appeal. They claim to be the presumptive reversioner to one Harnam Singh who owned the property in dispute. On 2nd November, 1944, after Harnam Singh's death his daughter Mst Biro, the second defendant, gifted the plaint properties to her sons who have been grouped together as the first defendant. The plaintiffs contended that the property is ancestral and that the daughter got only a life estate so they sue for a declaration that the gift will not affect their reversionary rights.

The defendants rely on custom. They state that, according to the customary law which governs the parties, collaterals beyond the fifth degree are not heirs in the presence of a daughter and her line. The plaintiffs, they say, are collaterals of the seventh degree, therefore they cannot displace the daughter. They also state that the property was not ancestral so the plaintiffs cannot challenge the daughter's alienation. The third line of defence related to a portion of the property which is not in dispute before us.

The property in suit consisted of three items

- (1) 253 bighas of Khas land,
- (2) a half share in 3 bighas 19 biswas, and
- (3) a share in certain shamlat property

The defendants say that Harnam Singh gifted 123 bighas of the Khas land to the second defendant that the gift was absolute and so the plaintiffs cannot get that portion of the property in any event.

The trial Judge held, on the admission of the plaintiff's counsel, that the land in dispute was non-ancestral and that the daughter's sons would succeed after her to the exclusion of the plaintiffs, therefore the gift by her to her sons amounted to an acceleration of the estate. The learned Judge dismissed the plaintiff's suit.

On appeal to the lower appellate Court, the finding that the property was non-ancestral was upheld as the plaintiffs' learned counsel in that Court did not contest the finding of the first Court on this point. As regards the acceleration, the learned Judge thought it necessary to examine a point which the plaintiffs had raised in the trial Court but which was ignored there, namely that a house was not included in the gift. Therefore it was argued that as the whole of the estate was not passed on to the next heir there was no acceleration. The learned Judge took evidence on this point and held that the house was not included and so found against the defendants. Accordingly he decreed the plaintiffs' claim for this part of the estate.

In the High Court the learned Judges upheld the concurrent finding about the non-ancestral nature of the property. Before them also the point was conceded by the plaintiffs' counsel. They also held that the house was not included in the gift but held that it was such a small part of the estate that the daughter's retention of it could not indicate an intention on her part not to efface herself from the estate.

They also held in the plaintiff's favour that they were collaterals in the fifth degree and not the seventh but held that as the property was non ancestral the daughter's sons were the nearest heirs, so the gift accelerated the estate and vested it in the donees despite the exclusion of the house. Accordingly, they reversed the decree of the lower appellate Court and restored that of the learned trial Judge.

Before us, the plaintiffs learned counsel tried to reopen the concurrent finding of the three Courts about the non ancestral nature of the property but we did not allow him to do so. The question is a mixed question of law and fact and the admission involved both. We were not shown how the facts admitted could be disentangled from the law so that we could determine whether the conclusion of law drawn from the admitted facts was wrong. The learned trial Judge said that the admission was made because of a previous decision in a former suit between the same parties or their predecessors. Harnam Singh had mortgaged a part of his estate and placed the mortgagees in possession. When he died some of his collaterals took possession of the unencumbered portion of the estate. The daughter Mst Biro therefore instituted two suits, one for possession against the collaterals including the present plaintiffs or their predecessors, and the other for a declaration against the mortgagees in possession. In this she also joined the same set of collaterals. Mst Biro succeeded on the ground that the property was non ancestral. These findings are obviously *res judicata* and if the plaintiffs' learned counsel had not conceded the point the question would at once have been raised and the previous judgments, which were exhibited (Exhibits DD and DF), would have concluded the matter. But as the point was conceded in all three Courts it was not necessary for the defendants to fall back on the previous decisions. It must therefore be accepted here that the whole of the land in dispute was non ancestral.

That brings us to the question of heirship. Paragraph 23 (2) of Rattigan's 'Digest of Customary Law' says that—

'In regard to the acquired property of her father, the daughter is preferred to the collaterals'. That is not disputed but what the plaintiffs contend is that she only succeeds as a limited heir and that after her the reversion will go to the father's heirs in the usual way. But that is not the Punjab custom among the tribe to which the parties belong, namely agricultural Jats. Rattigan quotes the following passage from page 61 of Roe and Rattigan's "Tribal Law of the Punjab" at page 411 of the 13th edition of his Digest.

Where a succession of a married daughter is allowed, the general principle is that she succeeds not as an ordinary heir but merely as the means of passing on the property to another male, whose descent from her father in the female line is allowed under exceptional circumstances to count as if it were descent in the male line. She will indeed continue to hold the land in her own name, even after the birth of sons and their attaining majority, for her own life but she has no more power over it than a widow would have. *If she has sons, the estate will of course descend to them and their lineal male issue, in the usual way.* But if she had no sons or if their male issue fail the land will revert except in some special instances where her husband is allowed to hold for his life, to her father's agnates just as it would have done *if no exception to the general rule of agnatic succession had ever been in her favour.*

This is supported by at least two decisions from the Punjab. In *Lehna v Mst Thakri*¹, two learned Judges of the Punjab Chief Court (the third dissenting) said in the course of a Full Bench decision that even in the case of ancestral property the daughter's sons and their descendants would exclude collaterals of the father. In a more recent case (1953) the Punjab High Court held in *Lal Singh v Roor Singh*²

that in the case of non ancestral property the daughters are preferred to collaterals

We were told that this rule only applies when the daughter succeeds and has no application when she predeceases her father. We say nothing about this because the case before us is one in which the daughter did succeed and all the authorities produced before us indicate that in that event her sons will exclude the collaterals. We were not shown any decision which has taken a contrary view. We are only concerned with non ancestral property here and express no opinion about what would happen in the case of ancestral property, though the observations of two of the learned Judges in the Full Bench of the Punjab Chief Court to which we have referred carry the rule over to ancestral property as well.

The learned counsel for the plaintiffs relies on paragraph 64 of Rattigan's Digest where it is stated that except in two cases which do not apply here, no female in possession of property from, among others, her father can permanently alienate it. But we are not concerned with an alienation here. The gift to the sons may or may not be good after Mst Biro's death as a gift. The question is whether there was an acceleration. If there was the form it took would not matter.

We turn, next, to the question of surrender and the only question there is whether the retention by Mst Biro of the house would prevent an acceleration of the estate. The extent of the property covered by the gift is over 253 bighas. She had an absolute right to gift 123 bighas of this and so the only portion to which the doctrine of surrender would apply would be the remaining 130 odd bighas. But the fact that she gave away all her property to her sons, bar this house, including property to which she had an absolute right, is relevant to show that her intention was to efface herself completely. Now as regards this house, Garja Singh (P W 1) gives us this description of it:

The distance between the door of the Sabbat and that of Darwaja is only about two karams (eleven feet). Opposite to Darwaja there is one Jhallani the door of which opens into the Sabbat and not in the courtyard. Except Darwaja Sabbat and Jhallani there is no other roofed portion in their house. There is only one compound for the cattle.

In this tiny dwelling live not only Mst Biro but also her three sons. It forms, as the High Court held, a very small part of the whole property. The retention of this, particularly in these circumstances when the sons already live there with her, would not invalidate the surrender. The law about this has been correctly set out in Mulla's "Hindu Law", 11th edition, page 217, in the following terms:

But the omission due to ignorance or to oversight of a small portion of the whole property does not affect the validity of the surrender when it is otherwise bona fide.

The present case is, in our opinion, covered by that rule. We agree with the High Court that the gift operated to accelerate the succession. That being the case, the plaintiffs are no longer the reversioners even if they would otherwise have been entitled to succeed on failure of the daughter's sons and their line. We need not decide whether the plaintiffs, as collaterals in the fifth degree, would be heirs at all.

The appeal fails and is dismissed with costs.

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT ¹—B K MUKHERJEA, VIVIAN BOSE, CHULAM HASAN, AND T L VENKATARAMA AYYAR, JJ

Hem Singh and Mula Singh

*Appellants**

v

Harnam Singh and another

Respondents

Custom (Punjab)—Rajam of Gurdaspur District—Answer to question 19 laying down that the adoption of near collateral only was recognised—Not mandatory—Adoption of collateral of eight degrees—Validly

The answer to question 19 of the *Rajam* of the Gurdaspur District of the year 1913 laying down that the adoption of near collaterals only was recognised is not mandatory. The custom recorded in the *Rajam* is in derogation of the general custom and those who set up such custom must prove it by clear and unequivocal language. The language is on the face of it ambiguous and there is no warrant for limiting the expression to signify collateral relationship only upto a certain degree and no further.

On appeal by special leave granted by His Majesty in Council dated the 30th October 1945 from the Judgment and Decree, dated the 12th July, 1944, of the High Court of Judicature at Lahore in Civil Regular Second Appeal No 450 of 1942 against the Judgment and Decree, dated the 14th January, 1942 of the Court of the District Judge Gurdaspur, in Appeal No 91 of 1941 arising from the Judgment and Decree dated the 31st July, 1941, of the Court of the Senior Subordinate Judge Gurdaspur, in Suit No 80 of 1940.

G S Vohra and Harbans Singh, Advocates, for Appellants

Achhru Ram Senior Advocate, (J B Dadachany and R N Sachthy, Advocates, with him) for Respondents

The Judgment of the Court was delivered by

Chulam Hasan J.—This is an appeal by special leave granted by the Privy Council against the Judgment and Decree, dated July 12, 1944 of a Division Bench of the High Court at Lahore passed in second appeal confirming the dismissal of the appellants' suit concurrently by the trial court and the court of the District Judge, Gurdaspur.

The two appellants are admittedly the first cousins of the respondent Harnam Singh and belong to village Gillanwali, Tahsil Batala, District Gurdaspur. Gurmej Singh, respondent 2, is a collateral of Harnam Singh in the 8th degree. The appellants sued for a declaration that the deed of adoption executed by Harnam Singh on July 30 1940, adopting Gurmej Singh was invalid and could not affect the reversionary rights of the appellants after the death of Harnam Singh. The appellants' case was that under the Customary Law of Gurdaspur District applicable to the Gill Jats of village Gillanwali, Harnam Singh could only adopt a "near collateral" and Gurmej Singh being a distant collateral his adoption was invalid. The defence was a denial of the plaintiffs' claim. Both the trial Judge and the District Judge on appeal held that the factum and the validity of the adoption were fully established. In second appeal Trevor Harries, GJ and Mahajan, J (as he then was) held that there was sufficient evidence of the factum of adoption as furnished by the deed and the subsequent conduct of Harnam Singh. They held that all that was necessary, under the custom to constitute an adoption was the

expression of a clear intention on the part of the adoptive father to adopt the boy concerned as his son and this intention was clearly manifested here by the execution and registration of the deed of adoption coupled with the public declarations and treatment as adopted son. Upon the legal validity of the adoption the High Court found that the answer to Question 9 of the *Ruaj-i-am* of Gurdaspur District of the year 1913 laying down that the adoption of 'near collaterals only' was recognised was not mandatory. The High Court relied in support of their conclusion on a decision of Tek Chand, J in *Jouala v Deuan Singh*¹ and the Privy Council decision in *Basant Singh v Brij Ray Saran Singh*².

The first question regarding the factum of adoption need not detain us long. The deed of adoption exhibit (D 1) recites that Harnam Singh had no male issue who could perform his *kurya Faram* ceremony after his death, that Gurnej Singh had been brought up while he was an infant by his wife and that he had adopted him according to the prevailing custom. The recital continues that since the adoption he had been treating and calling Gurnej Singh as his adopted son. This fact was well known in the village and the adoptee was enjoying all rights of a son. He had executed a formal document in his favour in order to put an end to any dispute which might be raised about his adoption. As adopted son he made him the owner of all of his property. We are satisfied that there is ample evidence to sustain the finding on the factum of adoption.

The main question which falls to be considered is whether under the terms of the *Ruaj-i-am* applicable to the parties Gurnej Singh being a collateral of Harnam Singh in the 8th degree could be validly adopted. The custom in question is founded on Question 9 and its Answer in the Customary law of the Gurdaspur District. They are as follows —

Question 9 — Is there any rule by which it is required that the person adopted should be related to the person adopting? I. o. what relatives may be adopted? Is any preference required to be shown to particular relatives? If so enumerate them in order of preference. Is it necessary that the adopted son and his adoptive father should be (1) of the same caste or tribe, (2) of the same got?

Answer — The only tribes that recognise the adoption of a daughter's son are the Sayyads of the Shakargash and the Arains of the Gurdaspur Tahsil. The Brahmans of the Batala Tahsil state that only such of them as are not agriculturists by occupation recognise such adoption. The Muhamedan Jats of the Gurdaspur Tahsil could not come to an agreement on this point. The remaining tribes recognise the adoption of near collaterals only. The right of selection rests with the person adopting. The Khattris, Brahmans and Bedis and Sodhis of the Gurdaspur Tahsil however state that the nearest collaterals cannot be superseded and selection should always be made from among them.

It is contended for the appellants that the expression 'near collaterals only' must be construed to mean a collateral up to the third degree and does not cover the case of a remote collateral in the 8th degree. The restriction as regards the degree of relationship of the adoptee it is urged is mandatory and cannot be ignored. The expression 'near collaterals' is not defined by the custom. The relevant answer which we have italicised above gives no indication as to the precise import of the words 'near collaterals'. The custom recorded in the *Ruaj-i-am* is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. The language is on the face of it ambiguous and we can see no warrant for limiting the expression to signify collateral relationship.

¹ (1937) 166 I.C. 237

² 180 I.L.R. 57 All. 491 (P.C.)

² (1935) 69 M.L.J. 275, I.L.R. 62 I.A.

only up to a certain degree and no further. We are also of opinion that the language used amounts to no more than an expression of a wish on the part of the narrators of the custom and is not mandatory. If the intention was to give it a mandatory force, the *Ruaj t-am* would have avoided the use of ambiguous words which are susceptible of a conflicting interpretation. The provision that the right of selection rests with the person adopting also detracts from the mandatory nature of the limitation imposed upon the degree of relationship. Though the adoption of what the custom describes as "near collaterals only" was recognized by the community of Jats, the right of selection was left to the discretion of the adopter. There is no meaning in conferring a discretion upon the adopter if he is not allowed to exercise the right of selection as between collaterals *inter se*. We are unable to read into the answer a restriction upon the choice of the adopter of any particular collateral however near in degree he may be.

In his valuable work entitled '*Digest of Customary Law in the Punjab*' Sir W. H. Rattigan states in para. 35 that "a sonless proprietor of land in the central and eastern parts of the Punjab may appoint one of his kinsmen to succeed him as his heir" and in para. 36 that "there is no restriction as regards the age or the degree of relationship of the person to be appointed". It appears to us that the basic idea underlying a customary adoption prevalent in the Punjab is the appointment of an heir to the adopter with a view to associate him in his agricultural pursuits and family affairs. The object is to confer a personal benefit upon a kinsman from the secular point of view unlike the adoption under the Hindu Law where the primary consideration in the mind of the adopter if a male is to derive spiritual benefit and if a female to confer such benefit upon her husband. That is why no emphasis is laid on any ceremonies and great latitude is allowed to the adopter in the matter of selection.

Mulla in his well known work on Hindu Law says

It has similarly been held that the texts which prohibit the adoption of an only son and those which enjoin the adoption of a relation in preference to a stranger are only directory, therefore, the adoption of an only son or a stranger in preference to a relation if completed is not invalid. In cases such as the above where the texts are merely directory the principle of *factum valet* applies, and the act done is valid and binding" (P. 541).

We see no reason why a declaration in a *Ruaj t-am* should be treated differently and the text of the answer should not be taken to be directory. However peremptory may be the language used in the answers given by the narrators of the custom, the dominant intention underlying their declarations which is to confer a temporal benefit upon one's kinsmen should not be lost sight of.

A number of cases have been cited before us to show that in recording the custom the language used was of a peremptory nature and yet the courts have held that the declarations were merely directory and non-compliance with those declarations did not invalidate the custom.

In *Juan Singh and another v. Pal Singh and another*,¹ Shah Din and Beadon, JJ., held "that by custom among Randhawa Jats of Mauza Bhangali, Tahsil Amritsar, the adoption, by a registered deed, of a collateral in the 9th degree who is of 16 years of age is valid in the presence of nearer collaterals". The adoption was objected to on the ground that the adoptee was a remote collateral and that he was

not under the age of twelve at the time of the adoption as required by the *Ruway-i-am*. The learned Judges held that the provision as regards the age was recommendatory and not of a mandatory character.

In *Sant Singh v Mula and Ors*¹, Robertson and Beadon, JJ, held "that among Jats and kindred tribes in the Punjab, the general, though not the universal, custom is that a man may appoint an heir from amongst the descendants of his ancestor and that he need not necessarily appoint the nearest collateral. This was a case where a distant collateral was preferred to a nearer collateral. The learned Judges expressed the opinion that the clause which points to the advisability of adopting from amongst near collaterals was nothing more than advisory.

In *Chanen Singh v Buta Singh and Ors*² a case from Jullunder District, the question and answer were as follows —

Question No. 1 — Are any formalities necessary to constitute a valid adoption if so describe them. State expressly whether the omission of any customary ceremonies will vitiate the adoption?

Answer — The essence of adoption is that the fact of adoption be declared before the brotherhood or other residents of the village. The usual practice is that the Baradari gathers together and the adopter declares in their presence the fact of the adoption. Sweets are distributed and a deed of adoption is also drawn up. If these formalities are not observed the adoption is not considered valid.

The adoption was challenged on the ground that there was no gathering of the brotherhood. The learned Judges (Addison and Beckett JJ) held that it was immaterial whether there was or was not a gathering of the brotherhood at the time. It appears that the adopter had made a statement in court acknowledging the appointment or adoption in question. The next day he celebrated the marriage of the boy as his son and thereafter he looked after his education and allowed him to describe himself as his adopted son or appointed heir, and the boy lived with him as his son. The learned Judges held that the details given in the answers to questions in various Customary Laws were not necessarily mandatory but might be merely indicative.

In *Jouala v Deuan Singh*³, Tek Chand, J, held "that an adoption of a collateral in the fourth degree among Jats of Mauza Hussanpur, Tahsil Nakodar District Jullundur, is valid although nearer collaterals are alive." He also held "that an entry in the *Ruway-i-am* as to the persons who can be adopted is merely indicative."

In a case from Delhi reported in "*Basant Singh and Ors v Brij Raj Saran Singh*", the Privy Council held "that the restriction in the *Ruway-i-am* of adoption to persons of the same *gotra* is recommendatory and a person of a different *gotra* may be adopted."

Counsel for the appellants frankly conceded that he could cite no case where the declarations governing customary adoptions were held to be mandatory.

Whether a particular rule recorded in the *Ruway-i-am* is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have, therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand, under the Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies

¹ 44 P.R. 1913, p. 173

² A.I.R. 1935 Lah. 83

³ (1937) 166 I.C. 237

⁴ (1935) 69 M.L.J. 225 L.R. 62 I.A. 180
I.L.R. 57 All. 494 (P.C.)

and to preferences in selection have to be held to be directory and adoptions made in disregard of them are not invalid

There is no substance in the appeal and we dismiss it with costs

Appeal dismissed

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction)

PRESENT —B K MUKHERJEA, VIVIAN BOSE AND GHULAM HASAN, JJ

Nar Singh and another

*Appellants **

v

The State of Uttar Pradesh

Respondent

Constitution of India (1950) Article 134 (1) (c)—Scope— Case —Meaning—If means case as a whole or of each individual person concerned—Appeal to Supreme Court on certificate issued wrongly—Power of Supreme Court

Case as used in Article 134 (1) (c) of the Constitution means the case of each individual person. That would be so even if the trial had been by the High Court itself but it is even more so on appeal because though several persons may join in presenting a common memorandum of appeal (if the Rules of the Court in question so permit the appeal of each forms a separate 'case' for those purposes. Where one of the several convicts appealing at the same time is entitled to a certificate under Article 134 (1) (c) it cannot be said that 'case' refers to the appeal as a whole and that a certificate should be issued to all the convicts.

The Supreme Court has general powers of judicial superintendence over all Courts in India and is the ultimate interpreter and guardian of the Constitution. It has a duty to see that its provisions are faithfully observed and where necessary to expound them. Article 134 (1) (c) uses the same language as Article 133 (1) (c). A certificate is required under Article 133 (1) in each of the four cases set out there out the mere grant of the certificate would not preclude the Supreme Court from determining whether it was rightly granted and whether the conditions prerequisite to the grant are satisfied. In the case of clause (c) of both of Article 133 (1) and Article 134 (1), the only condition is the discretion of the High Court but the discretion is a judicial one and must be judicially exercised along the well-established lines which govern these matters also the certificate must show on the face of it that the discretion conferred was invoked and exercised. If it is properly exercised on well-established and proper lines then as in all questions where an exercise of discretion is involved there would be no interference except on very strong grounds. But if on the face of the order it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not or that it had none then the superior Court must either remit the case or exercise the discretion itself. [Case law referred to]

Appeal under Article 134 (1) (c) of the Constitution of India from the Judgment and Order dated the 7th May, 1951, of the High Court of Judicature at Allahabad in Criminal Appeal No. 350 of 1950 arising out of the Judgment and Order, dated the 9th March, 1950, of the Court of the Additional Sessions Judge, Etah, in Sessions Trials Nos. 127 of 1949 and 10 of 1950.

S P Varma, Advocate, for Appellants

C P Lal, Advocate, for Respondents

The Judgment of the Court was delivered by

Bose, J.—Twenty four persons, among them the two appellants, were tried held 'guilty' under sections 148, 307/149 and 302/149 Indian Penal Code. Sixteen the acquitted and the remaining eight were convicted. On appeal to the High years of the more were acquitted and the only ones whose convictions were upheld objected two appellants, Nar Singh and Roshan Singh, and one Nanhu Singh

By a curious misreading of the evidence this Nanhu Singh was mixed up with Bechan Singh. What the High Court really meant to do was to convict Bechan Singh and acquit Nanhu Singh. Instead of that they acquitted Bechan Singh and convicted Nanhu Singh. As soon as the learned High Court Judges realised their mistake they communicated, with the State Government and an order was thereupon passed by that Government remitting the sentence mistakenly passed on Nanhu and directing that he be released.

This occasioned an application under Article 134 (1) (c) of the Constitution by Nanhu Singh and the two appellants Nar Singh and Roshan Singh for a certificate. The High Court rightly considered that the certificate should issue in the case of Nanhu Singh because, despite the remission of his sentence by the State Government and his release, his conviction on, among other things, a charge of murder, still stood, and the High Court understandably, thought that the stigma of that might affect him adversely in the future. As regards the other two, there was nothing in their cases to warrant the issue of a certificate but the learned High Court Judges thought (wrongly in our opinion) that they were bound to do so because Article 134 (1) (c) speaks of a "case" and they considered that the only "case" before them was the appeal as a whole. That, in our opinion, is wrong. "Case" as used there means the case of each individual person. That would be so even if the trial had been by the High Court itself but it is even more so on appeal because, though several persons may join in presenting a common memorandum of appeal (if the Rules of the Court in question so permit), the appeal of each forms a separate "case" for those purposes. That is obvious from the fact that every person who is convicted need not appeal nor need several convicts appeal at the same time under a joint memorandum, and if it were necessary to send up the "case" as a whole in the sense which the learned High Court Judges contemplate, it would be necessary to join even those who were acquitted so that the "case" (in that sense) could be reviewed in its entirety. We are clear that that is not the meaning of the word in the context of Article 134 (1) and that the High Court was wrong in thinking that it was.

Having obtained the certificate Nanhu did not appeal and the only ones who have come up here are the two convicts. Had they come up independently and presented a petition for special leave under Article 136 their petition would at once have been dismissed because there is nothing special in their cases to justify an appeal under that Article. The evidence against them is clear and it has been believed, accordingly, following our usual rule, we would have rejected the petition *in limine*. But, it was contended on their behalf that having obtained a certificate we have now become an ordinary Court of appeal and are bound to hear their case as an appellate Court both on facts and on law. Reliance was placed on a decision of the Federal Court reported in *Subhanand Choudhary v. Apurba Krishna Mishra*¹.

We do not think the judgment of the Federal Court can be applied to this case. It deals with section 205 of the Government of India Act, 1935, covering a different subject and does not use the same or similar words.

This Court has general powers of judicial superintendence over all Courts in India and is the ultimate interpreter and guardian of the Constitution. It has a duty to see that its provisions are faithfully observed and, where necessary,

¹ (1939-40) F.L.J. 58, (1940) 1 M.L.J. (Supp) 45, 1940 F.C.R. 31 (F.C.)

to expound them. Article 134 (1) (c) uses the same language as Article 133 (1) (c). A certificate is required under Article 133 (1) in each of the four cases set out there but the mere grant of the certificate would not preclude this Court from determining whether it was rightly granted and whether the conditions prerequisite to the grant are satisfied. In the case of clause (c) both of Article 133 (1) and Article 134 (1), the only condition is the discretion of the High Court but the discretion is a judicial one and must be judicially exercised along the well established lines which govern these matters (see *Banarsi Parshad v. Kashi Krishna*¹), also the certificate must show on the face of it that the discretion conferred was invoked and exercised. *Radhakrishna Ayyar v. Swaminatha Ayyar*² and *Radha Krishna Das v. Ras Krishna Chaudhary*³. If it is properly exercised on well-established and proper lines, then, as in all questions where an exercise of discretion is involved, there would be no interference except on very strong grounds. *Swaminarayan Jethalal v. Acharya Devendraprasadji*⁴ and *Bhagwati Devi v. Muralidhar Sahu*⁵. But if, on the face of the order, it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not, or that it had none, then the superior Court must either remit the case or exercise the discretion itself. *Brij Indar Singh v. Kanku Ram*⁶. These are the well known lines on which questions of discretion are dealt with in the superior courts and they apply with as much force to certificates under Article 134 (1) (c) as elsewhere.

In the present case, the learned High Court Judges thought they had no option. They misdirected themselves about the law and as a consequence did not exercise the discretion which is vested in them. They are quite clear as to what they would have done if, in their judgment, the law had left them scope for the exercise of any discretion, for they say—

Ordinarily no certificate can be granted to them as there is nothing of an exceptional nature in the 11 cases.

We hold therefore that the certificate was wrongly granted to the appellants and will treat their case as one under Article 136 (1) for special leave.

Regarded from that angle, this is not a proper case for special leave. The High Court gives a clear finding that there were more than five persons and believes the eye witnesses who identify the two appellants. The mere fact that only two out of the band of attackers were satisfactorily identified does not weaken the force of the finding that more than five were involved. The use of section 149, Indian Penal Code, was therefore justified and the convictions are proper.

We see no reason to interfere with the sentences. A number of persons joined in an attack at two in the morning on helpless persons who were asleep in bed. At least one of the assailants was armed either with a gun or a pistol. He shot one man dead and attempted to murder another, and the band looted their property. The sentences of two years, four years and transportation are therefore not severe and call for no review.

The appeal fails and is dismissed.

Appeal dismissed

1 (1900) 11 M.L.J. 56 L.R. 28 I.A. 11 at 13 I.L.R. 23 All. 227 (P.C.)

2 (1920) 40 M.L.J. 229 L.R. 48 I.A. 31 at 34 I.L.R. 44 Mad. 293 (P.C.)

3 (1901) L.R. 28 I.A. 182 at 183 I.L.R. 23 All. 415 (P.C.)

4 A.I.R. 1945 P.C. 100 102 L.R. 73 I.A. 98 (1) I.L.R. (1945) Kar. (P.C.) 87 (P.C.)

5 (1913) 2 M.L.J. 68 I.L.R. (1913) Kar. P.C. 80 A.I.R. 1913 P.C. 106 108 (P.C.)

6 (1917) 33 M.L.J. 486 L.R. 44 I.A. 218 I.L.R. 45 Cal. 94, 107 (P.C.)

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHRCHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ
 The Sales Tax Officer, Pilibhit

*Appellant**

Messrs Budh Prakash Jai Prakash

Respondent

Uttar Pradesh Sales Tax Act (XV of 1948) section 2 (h) and section 3 B—Definition of sale as including forward contracts—Val duty—Levy of sales tax on forward contracts—Ultra vires—Government of India Act 1935 Schedule VII, List II Entry 48—Scope

Under the Government of India Act 1935 the Provincial Legislature derived its power to impose a tax on the sale of goods under Entry 48 in List II of the Seventh Schedule and the Uttar Pradesh Sales Tax Act (XV of 1948) was enacted in exercise of this power. There having existed at the time of the enactment of the Government of India Act 1935 a well-defined and well established distinction between a sale and an agreement to sell it would be proper to interpret the expression 'sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and hold that it authorises the imposition of tax only when there is a completed sale involving transfer of title. The power conferred under Entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of property in the goods and not when there is a mere agreement to sell. The State Legislature cannot by enlarging the definition of 'sale' as including forward contracts arrogate to itself a power which is not conferred upon it by the Constitution Act and the definition of 'sale' in section 2 (h) of Uttar Pradesh Act (XV of 1948) must to that extent be declared *ultra vires*. For the same reason Explanation III to section 2 (h) which provides that forward contracts 'shall be deemed to have been completed on the date originally agreed upon for delivery' and section 3 B which enacts that notwithstanding anything contained in section 3, the turnover of any dealer in respect of transactions of forward contracts in which goods are not actually delivered shall be taxed at a rate not exceeding rupees two per unit as may be prescribed must also be held to be *ultra vires*.

Appeal under Article 133 (1) of the Constitution of India from the Judgment and Decree, dated the 28th February, 1952, of the High Court of Judicature at Allahabad in Writ Application No 7297 of 1951.

C P Lal, Advocate, for Appellant

N C Chatterjee, Senior Advocate (*Radhey Lal Agarwal*, Advocate, with him), for Respondent

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This is an appeal by the Sales Tax Officer, Pilibhit, against the judgment of the High Court of Allahabad granting firstly, a writ of *certiorari* quashing certain assessment orders made against the respondent, and secondly, a writ of prohibition in respect of certain other proceedings for assessment of tax under the provisions of the Uttar Pradesh Sales Tax Act (Act XV of 1948). The respondent is a firm doing business in forward contracts, and was assessed in respect of such contracts to a tax of Rs 1 082 8 0 for the year 1948-1949 by an order, dated 27th February, 1950, Exhibit A, and to a tax of Rs 7,369 for the year 1949-1950 by an order, dated 23rd May, 1950, Exhibit B. For the period, 1st April, 1950 to 31st January, 1951, the respondent paid a sum of Rs 845 4 0 as tax. Assessment proceedings were also started by the appellant in respect of certain forward contracts relating to gur and peas. The respondent challenged the legality of these proceedings and of the assessment orders on the ground that the Act in so far as it imposed a tax on forward contracts was *ultra vires* the powers

of the Provincial Legislature. The learned Judges agreed with this contention, and issued a writ of *certiorari* quashing the orders of assessment, Exhibits A and B and a writ of prohibition in respect of the proceedings for assessment of tax on forward contracts in gur and peas. The matter now comes before us in appeal under a certificate of the High Court under Article 133 (1) of the Constitution.

Under the Government of India Act, 1935, the Provincial Legislature derived its power to impose a tax on the sale of goods under Entry 48 in List II of the Seventh Schedule, and the Uttar Pradesh Sales Tax Act XV of 1948 was enacted in exercise of this power. Section 2 (h) of the Act defines "sale" as follows:

Sale means within its grammatical variations and cognate expressions any transfer of property in good for cash or deferred payment or other valuable consideration and includes forward contracts but does not include a mortgage, hypothecation, charge or pledge.

It is the extended definition of sale as including forward contracts in this section that is relied on as conferring authority on the appellant to make the orders in Exhibits A and B. The point for decision in this appeal is whether the power to impose a tax on the sale of goods under Entry 48 includes a power to impose a tax on forward contracts.

Under the statute law of India which is based on English law on the subject, a sale of goods and an agreement for the sale of goods are treated as two distinct and separate matters. Section 4 of the Indian Sale of Goods Act (Act III of 1930) runs as follows:

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

It will be noticed that though the section groups both sales and agreements to sell under the single generic name of "contracts of sale", following in this respect the scheme of the English Sale of Goods Act, 1893, it treats them as separate categories, the vital point of distinction between them being that whereas in a sale there is a transfer of property in the goods from the seller to the buyer, there is none in an agreement to sell. When the contract is to sell future goods, and under section 6 (3) of the Sale of Goods Act even if "the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods", there can be no transfer of title to the goods until they actually come into existence, and even then the conditions laid down in section 23 of the Act should be satisfied before the property in the goods can pass. That was also the law under the repealed provisions in Chapter VII of the Indian Contract Act, 1872. Section 77 of the Contract Act defined "sale" as follows:

"Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer."

Section 79 enacted that,

"Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer until it is ascertained, made or finished."

The corresponding provisions of the English Act are sections 1, 16 and Rule 5 of section 18. Section 1 is as follows:

(1) "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be contract of sale between one part-owner and another."

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Section 16 enacts that,

"Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Section 18, Rule 5, provides for the passing of property in future goods after they are ascertained.

The distinction between a sale and an agreement to sell under section 1 of the English Act is thus stated by Benjamin on Sale, Eighth Edition, 1930:

"In order to constitute a sale there must be—

(1) An agreement to sell, by which alone the property does not pass, and

(2) an actual sale by which the property passes."

It will be observed that the definition of a contract of sale above cited includes a mere agreement to sell as well as an actual sale.

This distinction between sales and agreements to sell based upon the passing of the property in the goods is of great importance in determining the rights of parties under a contract. The position is thus stated in Halsbury's "Laws of England," Volume 29, page 15 paragraph 13:

"An agreement to sell or as it is often stated an executory contract of sale is a contract pure and simple whereas a sale or as it is called for distinction an executed contract of sale is a contract plus a conveyance. Thus by an agreement to sell a mere *jus in personam* is created by a sale a *jus in rem* is transferred. Where goods have been sold and the buyer makes default in payment the seller may sue for the contract price but where an agreement to buy is broken usually the seller's only remedy is an action for unliquidated damages. Similarly if an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are the property of the seller and he can dispose of them. They may be taken in execution for his debts and if he becomes bankrupt they pass to his trustee in bankruptcy. But if there has been a sale and the seller breaks his engagement to deliver the goods the buyer has not only a personal remedy against the seller but also the usual proprietary remedies in respect of the goods themselves such as the actions for conversion and detinue. Again if there be an agreement for sale and the goods perish the loss as a rule falls on the seller while if there has been a sale the loss as a rule falls upon the buyer."

Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well defined and well established distinction between a sale and an agreement to sell it would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title.

This conclusion is further strengthened when regard is had to the nature of the levy. Section 3 of the Act provides for a tax being imposed at three pice in the rupee on the turnover of the assessee, and "turnover" is defined in section 2 (i) as "the aggregate of the proceeds of sale by a dealer", and that would consist of the price and any charges paid at the time of the delivery of the goods, as

provided in Explanation I The substance of the matter is that the sales tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should not be made, unless the stage has been reached when the seller can recover the price under the contract It is well settled that an action for price is maintainable only when there is a sale involving transfer of the property in the goods to the purchaser Where there is only an agreement to sell, then the remedy of the seller is to sue for damages for breach of contract and not for the price of the goods The law was thus stated in *Colley v Overseas Exporters*¹,

'In former days an action for the price of goods would only lie upon one or other of two counts First upon the indebitatus count for goods sold and delivered, which was pleaded as follows 'Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendants Bullen and Leake, 'Precedents of Pleading' 3rd edition, page 38 This count would not lie before delivery *Boulter v Arnott*² The count was applicable when upon a sale of goods the property has passed and the goods had been delivered to the purchaser and the price was payable at the time of the action brought Secondly upon the indebitatus count for goods bargained and sold, which was pleaded as follows 'Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant' Bullen and Leake, page 39 This count was applicable where upon a sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment If the property had not passed the count would not lie *Atkinson v Bell*³ In my view the law as to the circumstances under which an action will lie for the price of goods has not been changed by the Sale of Goods Act, 1893'

That is also the law in this country under section 53 of the Sale of Goods Act The only exception to this rule is when, under an agreement between the parties, the price is payable on a day certain irrespective of delivery, and that is not material for the purpose of the present discussion

The position therefore is that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the same position as sale price The power conferred under Entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell The State Legislature cannot, by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of "sale" in section 2 (h) of Act XV of 1948 must, to that extent, be declared *ultra vires* For the same reason, Explanation III to section 2 (h) which provides that forward contracts 'shall be deemed to have been completed on the date originally agreed upon for delivery', and section 3-B which enacts that

'Notwithstanding anything contained in section 3 the turnover of any dealer in respect of transactions of forward contracts in which goods are not actually delivered, shall be taxed at a rate not exceeding rupees two per unit as may be prescribed'

must also be held to be *ultra vires*

In the result, the decision of the High Court must be affirmed and this appeal dismissed with costs

Appeal dismissed

1 LR (1921) 3 K B 302 at 309, 310

2 (1833) 1 Cr & M 333

3 (1828) 8 B & C. 277

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —S R DAS, GHULAM HASAN AND B JAGANNADHADAS, JJ

Chhote Khan, deceased, represented by his son, Harmat and
others

Appellants*

v

Mal Khan and others

Respondents

Wajb ul arz—Original grant in favour of an individual made responsible for payment of entire land revenue—Other members of his family exempted from payment of land revenue—Subsequent conduct treating all the members as co-owners—Effect—Right of members other than grantee to claim partition—Agreement in wajb ul-arz—How far enforceable

Where there was a grant originally in favour of one member of the family who was made responsible for the payment of the entire land revenue and subsequently the other branches were treated as owners in equal shares notwithstanding that the original grantee was called sole owner in certain documents the other members are entitled to the properties as co-owners and can claim a partition of the properties

An entry regarding an agreement in a wajb ul arz holds good during the period of the settlement in which it is made and becomes inoperative when the settlement has come to an end

On appeal from the Judgment and Decree, dated the 10th November, 1944, of the High Court of Judicature at Lahore in Civil Regular First Appeal No 259 of 1942, arising out of the Judgment and Decree, dated the 29th July, 1942, of the Court of the Extra-Assistant Settlement Officer and Assistant Collector of the First Grade as Senior Sub Judge, Gurgaon, in Suit No 35 of 1940-41

Dr Bakshi Tek Chand, Senior Advocate (*Ram Nath Chadha*, and *Ganpat Rai*, Advocates, with him) for Appellants

Naumt Lal, Advocate for Respondents Nos 1, 3, 7 to 11 and 13 to 19

The Judgment of the Court was delivered by

Ghulam Hasan, J—This appeal is brought against the judgment and decree, dated 10th November, 1944, of the Lahore High Court (Sir Trevor Harries C J, and Mr. Justice Mahajan, the present Chief Justice of this Court) reversing the judgment and decree of the Assistant Collector, First Grade, Gurgaon, as Senior Subordinate Judge, and dismissing the plaintiffs appellants' suit

Dalmir, Dilmor and Chhunga were three brothers and Amir Khan and Sharif Khan were the two collaterals. Alif Khan was the son of Amir Khan. The present dispute is between the descendants of the five branches of the family

The suit was brought by the descendants of Dalmir against the descendants of Dilmor, Chhunga, Alif Khan and Sharif Khan. To this suit were also impleaded as defendants some of the descendants of Dalmir. The plaintiffs claimed a declaration that they along with defendants 17 to 19 are full owners in possession of 819 bighas, 19 biswas land situate in village Manota, Tehsil Ferozepore Jhirka, in the Gurgaon District that the defendants 1 to 16 had no right to claim partition of that land and that they were entitled only to the produce of land measuring 140 bighas 19 biswas possessed by them without payment of land revenue. The aforesaid defendants, it was alleged, were bound by the terms embodied in the agreement, dated 11th September, 1861, in the wajb-ul arz of that settlement and repeated in subsequent settlements which debarred them from any right to claim partition. Defendants 1 to 16 who are the contesting defendants, pleaded in defence that the

plaintiffs along with the pro-forma defendants 17 to 19 were recorded in Revenue papers as owners of 1/5th share in the land in dispute, while the contesting defendants were recorded as owners of the remaining 4/5th share and as such they were entitled to claim partition. The defendants denied that any agreement or condition in the *wajib-ul arz* restricting their right to partition was binding after the expiry of the term of the settlement and contended that it could not operate as a bar to their claim to partition. The Assistant Collector trying the suit as a Civil Court under section 117 of the Punjab Land Revenue Act (Act XVII of 1887) decreed the claim. He held that the contesting defendants were entitled only to get produce of 140 bighas and 19 biswas of land in their possession without payment of land revenue and had no interest in the remaining land. This decree was reversed on appeal the High Court holding that the defendants are entitled to 4/5th share as proprietors, that the original agreement repeated in subsequent settlements was binding on the parties so long as the settlements were in force, that it ceased to have any effect after the expiry of the settlements and that the renewal of its terms in the settlement of 1938-39 was not binding as they were not agreed to by the contesting defendants. The learned Judges held that the judgment (D-4), dated 15th June 1893 of the Chief Court of Punjab *inter partes* which held that the prohibition of partition contained in the *wajib-ul arz* did not survive the expiry of the period of the settlement, was binding upon them. They took the view that the contesting defendants being proprietors, the right of partition was inherent in their right of ownership. As a result of these findings the suit was dismissed.

We have heard Dr. Tek Chand, learned counsel for the appellants in support of the appeal at length but we are of opinion that there is no force in the appeal.

The parties are Meos and the land in dispute is situate in village Manota, Tehsil Ferozepore Jhirka, in Gurgaon District. According to the Gazetteer of Gurgaon District (1910) the Meos owned nearly the whole of the Ferozepore Tehsil and various other villages in Gurgaon. They are divided into several sub-tribes, and these sub-tribes possess a strong feeling of unity and the power of corporate action. It was stated that

in the Mutiny the members of each sub-division generally acted together, and district officers are advised to keep themselves informed of the names and characters of the men who from time to time possess considerable influence over their fellow tribesmen. (P. 60)

The documentary evidence regarding the title to the property in dispute ranges over a period of four settlements, each settlement being for a period of thirty years. The first settlement was made in 1839-42, the second in 1872-1879, the third in 1903-08 and the last in 1938-39 which is the current settlement. The village was assessed to annual revenue of Rs. 323 for the period of 30 years from 1246 to 1275 *fash* (corresponding to 1839-1862 A.D.) which was made payable by Dalmir Lambardar who is described as sole owner. Settlement papers were, however, lost during the Mutiny and after taking fresh measurements the settlement papers were completed. Alf Khan, Dalmir and Dilmor signed what is called an agreement binding them by all conditions, provisions and declarations made at the time of the Settlement (P. 12).

It is common ground that the property was originally granted in 1822 A.D., to Dalmir by Nawab Ahmad Bakhs Khan, *Rais* of Ferozepore Jhirka. The grant is not in writing and there is no contemporaneous record which could throw any light on its terms. Dalmir claimed to be the sole grantee with full proprietary rights. A number of documents are attached to the Settlement Record of 1863.

They are important as showing how the property was dealt with by the settlement authorities from time to time and the state of the Revenue records. The earliest document on record appears to be an agreement, dated 28th September, 1861, which is incorporated in Paragraph 18 of the *wajib-ul arz* of village Manota. It says that the tenure of the village is *zamindari*. Dalmir is entitled to profit and liable for loss in respect of the entire village. The other *biswadars* are owners of the produce of the land cultivated by them but they pay no revenue. This, it is stated, is the benefit they enjoy (P 35—D 11). This document is signed in token of verification by Dalmir Lambardar, Dilmor, Alif Khan Biswadar and Phusa Biswadar, who are described as proprietors. Phusa, we are told, is the *alias* of Chhinga. There is a report of Mr. John Lawrence (later Lord Lawrence) Settlement Officer referred to in the Gazetteer, which says that the arrangement then in vogue was that a few owners shared the profit and loss of the land revenue and the others were exempted from responsibility. Manota was one of the few villages which continued to follow the system (P 179).

Para 2 of the *wajib-ul arz* which relates to the mode of partition, after stating the area of the village as 837 bighas and 9 biswas, says

When we, the co-sharers want to partition it we ourselves will do so of our accord in accordance with our shares shown in the *Khewat* papers or through the village Patwari in the presence of *Panchayat* of the brotherhood. The new *abadi* (cultivation of new land) will be made with the consent of all the *biswadars*. One *biswadar* is not competent to make a new *abadi*. (D 10)

P 4 is a statement showing apportionment of *jama* (i.e. *Khewat* money) in the village. After stating that the settlement of the village was made in the name of Dalmir, sole owner, and that he alone was entitled to profit and liable for loss, it goes on to say that Alif Khan, son of Amir and Phusa son of Chhinga and Dilmor having cultivated a specified area of land became owners of the produce of the land without payment of rent and also became entitled to profit and liable for loss.

Paragraph 10 of the *wajib-ul arz* contains an agreement about trees. It shows that the trees standing in the house or field of the owner belong to him, and he is competent to plant and cut them. So far as the occupancy tenants are concerned, the trees standing in their houses also belong to them as they cultivate land but Dalmir alone had the right to cut or sell them. These are all the material documents pertaining to the Settlement Record of 1863.

We now come to the Settlement Record of 1877.

P 17 is an important document. Paragraph 1 which deals with the history of the village is reproduced below —

Fifty to six years ago in *Sambat* 1830 Dalmir Caste Meo Got Sogan along with Dilmor and Chhinga his real brothers took possession of the area of this village with the permission of Nawab Ahmed Bakht Khan Sahib *Rais* of Ferozepore who granted him a *Biswadari* estate without payment of any *nayana* in lieu of the services rendered by him and made this desolate tract *abad*. He along with his brothers jointly remained in possession thereof and enjoyed profit and bore loss. After him Amir Khan became *abad* in the village and along with us proprietors remained in possession. Accordingly we the proprietors got his name entered as a *Biswadar* at the time of the Revised Settlement. After him Sharif Khan son of Ghariba who was also a collateral came to this village in *Sambat* 1916 and remained in possession along with us proprietors. Accordingly we got his name also recorded along with ours on the 14th September 1863. We have up to this day been joint owners. This village has never been partitioned. Shares are given in the *Khewat* papers.

This document shows that although the name of Dalmir is mentioned as being the sole grantee by virtue of the services rendered by him to the Nawab, his two

brothers also were in joint possession with him. Not only this but Amir Khan and Sharif Khan, who are both collaterals, also had joint possession of the village. They are all described as proprietors and their names are recorded as joint owners. The authenticity of this document is beyond question. It cuts at the root of the theory of Dalmir being the sole owner. It is true that Dalmir was mentioned as the sole owner in D 4 but the grant was treated by Dalmir himself as being the joint property of his two brothers and the two collaterals whether or not it was originally intended for the benefit of the family as understood in its widest sense.

Paragraph 5 of the *wajib ul arz* relating to the tenure of the village and the mode of payment of revenue says that the village is *bilymal* (joint) and that the sons of Dalmir shall continue to pay the Government revenue in respect of their own shares as well as the shares of the sons of his two brothers and the shares of the collaterals. The reason given is that no money is taken from the said co-sharers on account of relationship (P 15). This statement is consistent only with joint ownership.

Paragraph 7 of the *wajib ul arz* also describes the tenure as *zamindari bilymal* and repeats the statement that the other co-sharers of Dalmir do not pay any rent or jama in respect of the land cultivated by them on account of their relationship. No single sharer has the right to reclaim the *Banjar* area without the consent of all the proprietors (P 19). This *wajib ul arz* is verified by the proprietors, tenants, *bhandadars* (a village servant to whom cultivation is allotted rent free), *kamins* (menials) and the inhabitants of the village. It is admittedly signed by the ancestors of the parties (P 22).

The *Khwat* and the *Khatauni* (P 31) prepared during the settlement both record the five branches of the family as being in possession of a $\frac{1}{5}$ th share each. A similar entry is to be found in the *Khatauni* (D 18).

It appears that during the currency of this settlement two suits for partition were filed in the Revenue Court but the partition was not allowed (P 5).

Coming to the settlement of 1903-08 we find a statement in clause 3 of the *wajib ul arz* (D 13) that the descendants of Dalmir alone could get the land partitioned in five equal shares but the descendants of the other four co-sharers, who were cultivating land without payment of revenue, owing to non rendition of account in respect of profit and loss of their respective shares, could not have the land partitioned.

Lastly we come to the *Jamabandi* of 1937-38 (P 1). This shows that all the five branches were entered as being in possession of equal shares.

Mehrab, grandson of Dalmir and one of the plaintiffs who gave evidence as P W 5 admitted that defendants 1 to 16 were shown as proprietors in the *Jamabandi* but he never raised any objection to it. He also admitted that Mehar Singh, grandson of Sharif Khan, sold his half share to Chhote Khan and Bhola, his co-plaintiffs and that they did not challenge the same.

We may now refer to the civil litigation which started in 1891. It arose upon the rejection of the applications for partition made by Alif Khan and Sharif Khan on 24th September, 1890, by the Assistant Collector. Alif Khan filed a suit against the descendants of the three brothers and the descendants of Sharif Khan. In the plaint (D 1) he claimed a declaration of $\frac{1}{5}$ th share of the entire village. The sons of Dalmir denied the claim. In their written statement (B 2) they alleged that in previous proceedings they had denied the plaintiffs' right to partition and

that the defendants had been in adverse possession of the land and that the plaintiffs and others had been cultivating land as bhandadars (village servants). The Subordinate Judge decreed the claim (D 3). This decree was upheld by the Divisional Judge but the judgment is not on record. In second appeal the Chief Court amended the decree by declaring that the plaintiff was entitled to 1/5th share in the village to be enjoyed subject to the qualifications and restrictions set forth in the Khewat and the wajih-ul-arz which do not permit of his obtaining partition while the present wajih-ul-arz was in force. This decree was made upon the admission made by the defendants in the course of the arguments. Paragraph 8 of the wajih-ul-arz of 1877 (D 12=p 16) which was the subject of conflicting interpretation by the parties was interpreted by the Chief Court to mean that its effect was to prohibit general division among the co-sharers while the wajih-ul-arz was still in force. They held that the five sons of Dalmir could separate their shares *inter se* but not the other co-sharers. We are of opinion that this judgment which is *inter partes* finally set at rest the controversy between them by declaring that the parties were joint owners holding equal shares and constitutes *res judicata*. The judgment is also in conformity with the true effect of the documentary evidence on the record. No doubt the name of Dalmir was entered in some documents as the sole owner but that entry by itself is not conclusive and must be read in conjunction with the other entries in the settlement record. Dalmir may have been the original grantee but his own conduct shows that he did not regard himself as absolute owner to the exclusion of his own brothers. Indeed according to the entry he even treated his collaterals on an equal footing. His description as sole owner in the circumstances carries no value. Whatever may have been the position at the time of the original grant, the subsequent conduct of the parties unmistakably shows that all the five branches were treated as owners in equal shares. Dalmir as the lam-bardar was made responsible for the payment of the entire land revenue. He was entitled to profit and was responsible for loss. The others were given less land and were exempted from payment of rent or revenue on account of relationship. This arrangement appears to have been fairly general in those days as appears from the report of Mr (later Lord) Lawrence, Settlement Officer, referred to above. The arrangement was that a few owners shared the profits and loss of the land revenue assessment while the others were exempted. The Government was primarily interested in the payment of the revenue and they apparently found it more convenient to hold the head or the most influential member of the family as responsible for payment of the entire revenue leaving it to him to make such arrangement among his co-sharers as he thought fit. In later settlements the owners accepting responsibility for the payment of the land revenue did not find it profitable and the system gradually disappeared. Lord Lawrence remarks that at the third settlement the number of villages which still continued the system was reduced to three and one of these was Manota in Ferozepore Tehsil (Page 179). This accounts for Dalmir being called the sole owner and being made responsible for payment of Government revenue.

By section 44 of the Punjab Land Revenue Act, an entry made in the record-of-rights or in an annual record shall be presumed to be true until the contrary is proved. That entries in the jamabandies fall within the purview of the record-of-rights under section 31 of the Act admits of no doubt. Section 16 of the old Act (XXIII of 1871) laid down that entries in the record of rights made or authenticated

at a regular settlement shall be presumed to be true. We are satisfied that the materials on the record taken as a whole justify the view which has been taken by the High Court that the contesting defendants are joint owners and not mere cultivators who are not entitled to claim partition of the property. The judgment of the Chief Court also recognised the proprietary right of the defendants but qualified it by the declaration that so long as the settlement was in force, they were not entitled to partition by reason of their agreement recorded in the settlement papers. The settlements of 1877 and 1908-09 have ceased to operate and the entry in the current settlement of 1938-39 having been made under the orders of the Collector has no value when the contesting defendants did not agree to its being incorporated. The previous agreement was not one for perpetuity but for a limited period only and there is no reason in law why the prohibition against partition should be now enforced against the contesting defendants. It has been held in a number of cases that the entry regarding agreement in a *wajib-ul arz* holds good during the period of the settlement in which it is made and becomes inoperative when the settlement has come to an end—*Hira and others v Muhammad and others*¹ and *Alla Bakhsh and others v Mirza Bashir ud din and others*² and *Lieut Chaudhri Chhattar Singh v Mt Shugni and another*³.

We agree with the High Court in holding that partition is a right incident to the ownership of property and once the defendants are held as co-owners, their right to partition cannot be resisted.

It was contended by Dr Tek Chand that the appellants had acquired title by adverse possession over the defendants' share for more than 50 years. This plea was raised in the plaint but evidently it was not pressed for no issue was framed nor any finding recorded by the trial Court. This point is not taken even in the grounds of appeal to this Court. The plea has no substance and was rightly rejected by the High Court on the ground that possession was under an arrangement between the co-sharers and no question of adverse possession could arise under the circumstances.

We hold that there is no force in this appeal and dismiss it with costs.

Appeal dismissed

SUPREME COURT OF INDIA

[Criminal Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ
Dhirendra Kumar Mandal

*Appellant**

v

The Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal on behalf of the State Government

Respondent

The Union of India

Intervener

Criminal Procedure Code (1 of 1898) Section 269 (1)—Power of State Government to direct the trial of all offences or of any classes of offences before any court of session to be by jury—Power to revoke such order—Discretion of trial by jury in respect of specified offence only—If offends against equal protection of laws—Constitution of India (1950) Article 14—Scope

Though the trial by jury is undoubtedly one of the most valuable rights which the accused can have it has not been guaranteed by the Constitution. Section 269 (1) of the Code of Criminal Pro-

¹ 16 P R. 1915 (p 89)

² 1932 L.T.R. 36

* Criminal Appeal No 48 of 1952

cedure is an enabling section and empowers the State Government to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury. It has the further power to revoke or alter such an order. There is nothing wrong if the State discontinues trial by jury in any district with regard to all or any particular class of offences. But it cannot direct that the trial of a particular case or of a particular accused shall be in the Court of Session by a jury while in respect of other cases involving the same offence the trial shall be by means of assessors. Section 269 does not take notice of individual accused or of individual cases. The section does not envisage that persons accused of the same offence but involved in different cases can be tried by the Court of Session by a different procedure namely some of them by jury and some of them with the help of assessors. The ambit of the powers of revocation or alteration is co-extensive with the power conferred by the opening words of the section and cannot go beyond those words. In exercise of the powers of revocation also the State Government cannot pick out a particular set of cases and revoke the notification *qua* these cases only and leave the cases of other persons charged with the same offence triable by the Court of Session by jury.

Accordingly the notification revoking the trial by jury in respect of accused persons involved in the "Burdwan Test Relief Fraud Cases" denies to certain individuals the right to be tried by jury while retaining that right in the case of other individuals who have committed the same or similar offences and in this respect it travels beyond the power conferred on the State Government by section 269 (1) of the Code of Criminal Procedure and is thus void and inoperative.

The notification is also bad as it contravenes the provisions of Article 14 of the Constitution. The defect in the trial without jury but with the help of assessors is not cured by the provisions of section 536 of the Code where objection in the first instance was not taken at the trial. The nature of the objection is such that it goes to the very root of the jurisdiction of the Court, and such an objection can be taken notice of at any stage.

Queen Empress v. Ganapathi Vanniar and others, 11 L.R. 23 Mad 632, overruled.

The notification was discriminatory in character on the coming into force of the Constitution and was hit by Article 14 of the Constitution.

Appeal under Article 134 (1) (c) of the Constitution of India from the Judgment and Order, dated the 21st March, 1952, of the High Court of Judicature at Calcutta (*Das Gupta and Lahiri, JJ*) in Criminal Appeal No. 77 of 1950, arising out of the Judgment and Order, dated the 29th April, 1950, of the Court of the Additional Sessions Judge, Burdwan, in Sessions Trial No. 1 of 1950.

N C Chakravarti and Sukumar Ghose, Advocates for Appellant.

B Sen and I N Shroff (for *P K Bose*) Advocates for Respondent.

G N Joshi and P G Gokhale, Advocates for Intervener.

The Judgment of the Court was delivered by

The Mahajan, C J—This is an appeal under Article 134 (1) (c) of the Constitution of India from the judgment of the High Court at Calcutta, dated the 21st of March, 1952, whereby the High Court upheld the conviction of the appellant under section 467 of the Indian Penal Code but reduced the sentence passed upon him by the Additional Sessions Judge of Burdwan.

The appeal concerns one of a series of cases known generally as "The Burdwan Test Relief Fraud Cases" which had their origin in the test relief operations held in the District of Burdwan in 1943 during the Bengal famine of that year. The acute scarcity and the prevailing distress of the famine-stricken people in the district called for immediate relief and test relief operations were undertaken by the District Board in pursuance of the advice of the District Magistrate. The Government of Bengal sanctioned four lakhs of rupees as advance to the District Board for such test relief operations. The District Board, however, instead of conducting the relief work directly, appointed several agents on commission basis through whom the test relief operations were carried out. This was in clear violation of the Bengal Famine Code and the Famine Manual, 1941, and as exceedingly large sums were

being spent, the suspicions of the Government were aroused about the *bona fides* of the test relief work carried out through their agents. This led to an enquiry and as a result of this several cases were started against various persons and the appellant's case is one of them.

The Government reached the decision that these cases were not fit for trial by jury and accordingly on 24th February, 1947, a notification was issued for trial of these cases by the Court of Sessions with the aid of assessors. The notification is in these terms —

“No. 4591—17th February, 1947—Whereas by a notification, dated the 27th March, 1893, published in the Calcutta Gazette of the same date, it was ordered that on and after the 1st day of April, 1893 the trial of certain offences under the Indian Penal Code before any Court of Session in certain districts including the district of Burdwan shall be by jury,

‘And whereas by notification No. 33471 dated the 22nd September, 1939 published at page 2505 of Part I of the Calcutta Gazette of the 28th September, 1939, it was ordered that on and from the 1st day of January, 1940, the trial of certain other offences under the Indian Penal Code before any Court of Session shall be by jury,

“And whereas certain persons are alleged to have committed offences under sections 120-B, 420, 467, 468, 471 and 477 A of the Indian Penal Code in a set of cases known as the ‘Burdwan Test Relief Fraud Cases’ of whom the accused persons in two cases, namely *Emperor v. Dharendra Nath Chatterjee and others* and (2) *Emperor v. Golam Rahman and others* have been committed to the Court of Session at Burdwan for trial and the accused persons in the remaining cases may hereafter be committed to the said court for trial,

“Now, therefore, the Governor in exercise of the power conferred by sub-section (1) of section 269 of the Code of Criminal Procedure, 1898 is pleased to revoke the said notifications in so far as they apply to the trial of the offences with which the accused in the said cases are charged in the Court of Session’

In pursuance of this notification the appellant along with six others was sent up for trial before the Additional Sessions Judge of Burdwan. The charge against him was under section 420 read with section 120-B, Indian Penal Code, for conspiracy to cheat the District Board of Burdwan and some of its officers in charge of the test relief operations between the 21st May and the 21st July, 1943. The appellant was also charged on 24 counts of forgery under section 467, Indian Penal Code and the case for the prosecution against the appellant on these counts was that he committed forgery by putting his own thumb impressions on pay sheets on which the thumb impressions of persons who received payment for work done on a road which was constructed as part of a scheme for the relief of the people in Burdwan ought to have been taken. He was one of the persons appointed by Jnanendra Nath Choudhuri, an Agent, and it was his duty to disburse the money to the mates in charge of the gangs and to take thumb impressions on pay sheets in token of receipt of payment. It was alleged that the appellant put his own thumb impressions in several cases mentioned in the charges with full knowledge that no payment had been made and put names of imaginary persons against the thumb impressions to make it appear that payments had been made to real persons and by this process had obtained wrongful gain for himself and for his employers.

The appellant's plea in defence was that the thumb impressions were not his and alternatively if the thumb impressions were his, he put them on the authority of persons whose names were shown against the thumb impressions and that in putting these thumb impressions he did not act dishonestly or fraudulently.

The learned Additional Sessions Judge acquitted the appellant and all other accused persons on the charge of conspiracy to cheat under section 420 read with section 120-B, Indian Penal Code. He, however, convicted the appellant under

eleven specific charges of forgery under section 467, Indian Penal Code and sentenced him to *undergo rigorous imprisonment for a period of one year*. On appeal the conviction of the appellant was affirmed in regard to nine counts only and the sentence was reduced.

The main point urged by the appellant in the High Court was that the trial was vitiated inasmuch as he was denied the equal protection of laws under Article 14 of the Constitution. The High Court rejected this contention and held that the appellant's trial before the Additional Sessions Judge with the aid of assessors was a valid trial in accordance with law. Das Gupta, J, who delivered the judgment of the Court observed as follows—

‘By this notification the Government acting in the exercise of powers under section 269 of the Code of Criminal Procedure formed one class of all the cases known as the Burdwan Test Relief Cases in which some persons had prior to the date of the notification alleged to have committed some specified offences and withdrew from these trial by jury so that these became triable by the aid of assessors. The question is whether this classification satisfied the test that has been laid down mentioned above. In my judgment these cases which are put in one class have the common feature that a mass of evidence regarding the genuineness of thumb impressions and regarding the existence or otherwise of persons required consideration. This was bound to take such a long time that it would be very difficult if not impossible for a juror to keep proper measure of the evidence. This common feature distinguished this class from other cases involving offences under the same sections of the Indian Penal Code. The classification in my judgment reasonable with respect to the difference made by the withdrawal of jury trial and is not arbitrary or evasive.

The appellant made an application to the High Court for leave to appeal to this Court and the leave was allowed. It was contended at the time of the leave that by a notice of revocation the State Government could not deprive particular persons of the right of trial by jury leaving other persons charged of the same class or classes of offences with a right to be tried by a jury. The Bench thought that this was a point of considerable difficulty and was a fit one to be decided by this Court.

The learned counsel for the appellant urged two points before us. In the first instance, he contended that the notification was in excess of the powers conferred on the State Government under section 269 (1) of the Code of Criminal Procedure and that it travelled beyond that section. Secondly it was urged that the notification denied the appellant equal protection of the laws and was thus an abridgement of his fundamental right under Article 14 of the Constitution and the view of the High Court that the classification was not arbitrary or evasive was incorrect.

At this stage it may be mentioned that the Union Government, at its request, was allowed to intervene in this appeal in view of the contention raised by the appellant that section 269 (1) of the Code of Criminal Procedure was void by reason of its being inconsistent with the provisions of Part III of the Constitution. The intervention, however, became unnecessary because the learned counsel for the appellant abandoned this point at the hearing and did not argue it before us.

As regards the two points urged by the learned counsel, it seems to us that both the contentions raised are well founded. The notification, in our opinion, travels beyond the ambit of section 269 (1) of the Code of Criminal Procedure. This section is in these terms—

The State Government may by order in the Official Gazette, direct that the trial of all offences, or of any particular class of offences before any Court of Session, shall be by jury in any district, and may revoke or alter such order.

Though the trial by jury is undoubtedly one of the most valuable rights which the accused can have, it has not been guaranteed by the Constitution. Section 269 (1) of the Code of Criminal Procedure is an enabling section and empowers the State Government to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury. It has the further power to revoke or alter such an order. There is nothing wrong if the State discontinues trial by jury in any district with regard to all or any particular class of offences but the question is whether it can direct that the trial of a particular case or of a particular accused shall be in the Court of Session by jury while in respect of other cases involving the same offence the trial shall be by means of assessors. It appears to us that the section does not empower the State Government to direct that the trial of a particular case or of a particular accused person shall be by jury while the trial of other persons accused of the same offence shall not be by jury. On a plain construction of the language employed in the section it is clear that the State Government has been empowered to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury in any district. The section does not take notice of individual accused or of individual cases. It only speaks of offences or of a particular class of offences, and does not direct its attention to particular cases or classes of cases and it does not envisage that persons accused of the same offence but involved in different cases can be tried by the Court of Session by a different procedure, namely some of them by jury and some of them with the help of assessors. The ambit of the power of revocation or alteration is co-extensive with the power conferred by the opening words of the section and cannot go beyond those words. In exercise of the power of revocation also the State Government cannot pick out a particular case or set of cases and revoke the notification *qua* these cases only and leave cases of other persons charged with the same offence triable by the Court of Session by jury. This was the construction placed on the section by Mr. Justice Chakravarti and was endorsed by some of us in this Court in *The State of West Bengal v. Anwar Ali Sarkar*¹. It was there pointed out that a jury trial could not be revoked in respect of a particular case or a particular accused while in respect of other cases involving the same offences that order still remained in force.

The notification in this case clearly refers to accused persons involved in the 'Burdwan Test Relief Fraud Cases' and does not remove from the category of offences made triable by jury offences under sections 120-B, 467, 468, 477, etc., no matter by whom committed or even committed within a particular area. The cases of persons other than the accused and involved in offences under sections 120-B, 420, 467, 468, 477 are still triable by a Court of Session by jury.

The language of the earlier notification of 1893 and of the second notification of 1939 by which it was directed that the trial in Court of Session of certain offences in certain districts shall be by jury is significant and is in sharp contrast to the language used in the operative portion of the impugned notification. By the notification of the 27th March, 1893, it was ordered that on or after the 1st day of April, 1893, the trial of certain offences under the Indian Penal Code before any Court of Session in certain districts including the district of Burdwan shall be by jury. It will be noticed that this notification has no reference to cases of any individuals or particular accused persons, it is general in its terms. By the notification dated

the 22nd September, 1939 it was ordered that on and from the 1st day of January 1940, the trial of certain other offences under the Indian Penal Code before any Court of Session shall be by jury. This notification is also in general terms. In other words, the first notification made out a schedule of offences and directed that those offences, irrespective of the fact by whom they were committed, be tried by a Court of Session by jury. The second notification added a number of other offences to that list. The revocation order does not subtract any offences from the list, it leaves them intact. What it does is that it denies to certain individuals the right to be tried by jury while retaining that right in the case of other individuals who have committed the same or similar offences and in this respect it travels beyond the power conferred on the State Government by section 269 (1) of the Code of Criminal Procedure, and is thus void and inoperative.

We are further of the opinion that the notification is also bad as it contravenes the provisions of Article 14 of the Constitution. The High Court negatived this contention on the ground that the classification made for withdrawal of jury trial in these cases was reasonable and was neither arbitrary nor evasive. It was said that these cases formed one class of cases and that they had the common feature that a mass of evidence regarding the genuineness of thumb impressions and regarding the existence or otherwise of persons required consideration and that this was bound to take such a long time that it would be very difficult if not impossible, for a juror to keep proper measure of the evidence, and that these common features distinguished this class of cases from other cases involving offences under the same sections of the Indian Penal Code.

Now it is well settled that though Article 14 is designed to prevent any person or class of persons from being singled out as a special subject for discriminatory legislation, it is not implied that every law must have universal application to all persons who are not by nature, attainment or circumstance in the same position, and that by process of classification the State has power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification, however must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. The notification, in express terms, has not indicated the grounds on which this set of cases has been segregated from other sets of cases falling under the same sections of the Indian Penal Code. The learned Judges of the High Court however thought that this set of cases was put into one class because of their having the

common features that a mass of evidence regarding the genuineness of thumb impressions and regarding the existence or otherwise of persons required consideration and this was bound to take such a long time that it would be very difficult, if not impossible, to measure of the evidence.

In our opinion this classification has no relation to the object in view, that is, the withdrawal of jury trial in these cases. There can be mass of evidence in the case of persons accused of the same offence in other cases or sets of cases. The mere circumstance of a mass of evidence and the suggestion that owing to the length of time the jurors might forget what evidence was led before them furnishes no reasonable basis for denying these persons the right of trial by jury. It is difficult to see how assessors can be expected to have better memory than jurors in regard to cases in which a mass of evidence has to be recorded and

which may take a long time. It is a matter of daily experience that jury trials take place in a number of cases of dacoity, conspiracy, murder, etc., where the trial goes on for months and months and there is a mass of evidence. On that ground alone a jury trial is not denied, as that is not a reasonable basis for denying it. The memory of jurors, assessors, judges, and of other persons who have to form their judgment on the facts of any case, can afford no reasonable basis for a classification and for denial of equal protection of the laws. Similarly, the quantum of evidence in a particular case can form no reasonable basis for classification and thus can have no just relation to the object in view. The features mentioned by the High Court can be common to all cases of forgery, conspiracy, dacoity, etc.

Mr Sen for the respondent State contended in the first instance, that the defect in the trial, if any, was cured by the provisions of section 536 of the Code of Criminal Procedure as this objection was not taken in the trial court. In our opinion, this contention is without force. Section 536 postulates irregularities at the trial after the commencement of the proceedings but it does not concern itself with a notification made under section 269 (1) which travels beyond the limits of that section or which contravenes Article 14 of the Constitution. The chapter of the Code of Criminal Procedure in which this section is included, deals with mere procedural irregularities in the procedure committed by a Court and envisages that when an objection is taken, the Court is then enabled to cure the irregularity. This argument cannot apply to a case like the present. The Court had no power to direct a trial by jury when the Government had revoked its notification with reference to these cases. Moreover the nature of the objection is such that it goes to the very root of the jurisdiction of the Court and such an objection can be taken notice of at any stage. Mr Sen placed reliance on a Bench decision of the Madras High Court in *Queen Empress v Ganapathi Vannanar and others*¹. The matter there was not considered from the point of view mentioned above and we do not think that that case was correctly decided.

Mr Sen further argued that in any case the notification in this case was issued in February, 1947, three years before the Constitution came into force, and that though the trial had not concluded before the coming into force of the Constitution, the trial that had started by the Court of Session with the help of assessors was a good trial and it cannot be said that it was vitiated in any manner. Now it is obvious that if the assessors here were in the status of jurors and gave the verdict of 'not guilty' as they did in this case, the accused would have been acquitted unless there were reasons for the Sessions Judge to make a reference to the High Court to quash the trial. Clearly therefore the accused was prejudiced by a trial that continued after the inauguration of the Constitution and under a procedure which was inconsistent with the provisions of Article 14 of the Constitution. It was also vitiated because the notification which authorised it also travelled beyond the powers conferred on the State Government by section 269 (1) of the Code of Criminal Procedure.

Mr Sen, for the contention that the continuation of the trial after the inauguration of the Constitution under the notification of 1947, even if that notification was discriminatory in character, was not invalid, placed reliance on two decisions of

this Court—(1) *Syed Kasim Razvi v The State of Hyderabad*¹ and (2) *Habeeb Mahomed v The State of Hyderabad*². In our opinion, these decisions instead of helping his contention, completely negative it so far as the facts of this case are concerned. In both these decisions, it was pointed out that for the purpose of determining whether the accused was deprived of the protection under Article 14, the Court has to see first of all, whether after eliminating the discriminatory provisions it was still possible to secure to the accused substantially the benefits of a trial under the ordinary law and if so, whether that was actually done in the particular case. Now it is obvious that it is impossible to convert a trial held by means of assessors into a trial by jury and a trial by jury could not be introduced at the stage when the procedure prescribed by the notification became discriminatory in character. It is not a case where the discriminatory provision of the law can be separated from the rest. Again, a fair measure of equality in the matter of procedure cannot be secured to the accused in this kind of cases. As pointed out in *Syed Kasim Razvi's case*³ if the normal procedure is trial by jury or with the aid of assessors and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage and that having once adopted the summary procedure it is not possible to pass on to a different procedure at a later date. In such cases the whole trial would have to be condemned as bad. The same was the view taken by this Court in *Lachmandas Kewalram Ahuja v The State of Bombay*⁴. That case proceeded on the assumption that it was not possible for the Special Court to avoid the discriminatory procedure after the 26th January, 1950. Therefore the trial was bad. In view of these observations, it is not possible to accept this part of Mr Sen's contention.

Mr Sen, in his quiet manner faintly suggested that in view of the decisions of this Court in *Kathi Raning Rawat v The State of Saurashtra*⁵ and *Kedar Nath Bajoria v The State of West Bengal*⁶, the decision of this Court in *Anwar Ali Sarkar's case*⁷ in which it was pointed out that the State Government could not pick out a particular case and send it to Special Court for trial had lost much of its force. It seems to us that this suggestion is based on a wrong assumption that there is any real conflict between the decision in *Anwar Ali Sarkar's case*⁷ and the decision in the *Saurashtra case*⁵ or in the case of *Kedar Nath Bajoria*⁶. It has been clearly pointed out by this Court in *Kedar Nath Bajoria's case*⁶ that whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violates Article 14 of the Constitution must be determined in each case as it arises, and no general rule applicable to all cases can be laid down. Different views have been expressed on the question of application of Article 14 to the facts and circumstances of each case but there is no difference on any principle as to the construction or scope of Article 14 of the Constitution. The majority judgment in *Kedar Nath Bajoria v The State of West Bengal*⁶ distinguished *Anwar Ali Sarkar's case*⁷ on the ground that the law in *Bajoria's case*⁶ was based on a classification which, in the context of the abnormal post war economic and social conditions was readily intelligible and obviously calculated to subserve the legislative purpose, but did not throw any doubt whatsoever on the correctness of that decision. The present notification is

1 (1953) S.C.J. 151, 1953 S.C.R. 589 (S.C.)

2 (1953) S.C.J. 361, 1953 S.C.R. 661 (S.C.)

3 (1952) S.C.J. 339, 1952 S.C.R. 710 (S.C.)

4 (1952) S.C.J. 163, 1953 S.C.R. 435 (S.C.)

5 (1953) S.C.J. 580, 1954 S.C.R. 30 (S.C.)

6 (1952) S.C.J. 52, 1952 S.C.R. 284 (S.C.)

more on the lines of the Ordinance that was in question in *Anwar Ali Sarkar's case*¹ and has no affinity to the Ordinance and the attending circumstances that were considered in the *Saurashtra case*² or in the case of *Kedar Nath Bajoria*³, and in the light of that decision it must be held that the notification issued in 1947 became discriminatory in character on coming into force of the Constitution and was hit by Article 14 of the Constitution

The result therefore is that the trial of the appellant after the 26th January, 1950, by the Sessions Judge with the aid of assessors was bad and must therefore be quashed and the conviction set aside. In our opinion, it would not advance the ends of justice if at this stage a fresh trial by jury is ordered in this case. We therefore allow the appeal, set aside the conviction of the appellant and direct that he be set free.

Appeal allowed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHRCHAND MAHAJAN, Chief Justice, B K MUKHERJEA, VIVIAN BOSE N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Shri Audh Behari Singh

*Appellant**

v
Gajadhar Japuria and others

Respondents

Custom—(Banaras)—Pre-emption—Nature of right—If personal or incident of property

The law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. The crux of the whole thing is the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

Where the right of pre-emption is set up by non-Muslims on the basis of a custom the existence of the custom is a matter to be established by proper evidence. When the existence of a custom under which the Hindus claim to have the same rights of pre-emption as Mahomedans in any district, is generally known and judicially recognised it is not necessary to prove it by further evidence.

When a right of pre-emption rests upon custom it becomes the *lex loci* or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the land except where such incidents are proved to be a part of the custom itself. *Bynath v Kapilmon Singh* (1875) 24 W.R. 95. *Parsath Nath v Dhannu* (1905) I.L.R. 32 Cal 983 and the proposition in Wilson's *Anglo-Muhammadan Law*, Sixth edition paragraph 352, held not to be correct law.

[It was held that a local custom of pre-emption exists in the City of Banaras and the right attaches at least to all house properties situated within it and no incident of such custom is proved which would make the right available only between persons who are either natives of Banaras or are domiciled therein.]

On Appeal from the Judgment and Decree, dated the 29th August, 1944 of the High Court of Judicature at Allahabad (Mulla and Yorke, JJ) in First Appeal No. 157 of 1942 arising out of the Judgment and Decree dated the 19th

¹ (1952) S.C.J. 55 1952 S.C.R. 284 (S.C.)

² (1952) S.C.J. 168 1952 S.C.R. 435 (S.C.)

³ (1953) S.C.J. 580 1954 S.C.R. 30 (S.C.)

* Civil Appeal No. 15 of 1951

November, 1941 of the Court of the Civil Judge at Banaras in Original Suit No 79 of 1941

Achhru Ram, Senior Advocate (*A C Sen* and *R C Prasad*, Advocates, with him) for Appellant

C A Daphtry, Solicitor-General for India and *S P Sinha*, Senior Advocate (*J C Mukherji*, *Shaukat Husain* and *S P Varma*, Advocates, with them) for Respondent No 1

The Judgment of the Court was delivered by

Mukherjea, J—The plaintiff, who is the appellant before us, commenced the suit, out of which this appeal arises in the court of the Civil Judge at Banaras (being Original Suit No 79 of 1941) for enforcement of his right of pre-emption in respect of an enclosed plot of land with certain structures upon it, situated within Mohalla Baradeo in the city of Banaras and bearing Municipal No D37/48. The premises in suit admittedly belonged to defendants 2 to 5, who are residents of Calcutta and they sold it by a conveyance executed on the 29th March, 1941 and registered on the 3rd of April following to defendant No 1, also a resident of Calcutta, for the price of Rs 7,000. The plaintiff is the owner of the two premises *in suit*, premises Nos D 37/85 and D 37/44, within the same Mohalla of the city of Banaras which are in close proximity to the property in dispute and adjoin it on the northern and eastern sides respectively. It is averred by the plaintiff that there is from very early time a custom prevalent in the city of Banaras according to which the plaintiff was entitled to claim pre-emption of the property in dispute on the ground of vicinage. It is said that as soon as the plaintiff received news of the sale, he made an immediate assertion or demand of his rights and repeated the same in the presence of the witnesses as required by Muhammadan law and he further sent a registered notice to defendant No 1 on the 21st May, 1941, asking the latter to transfer the property to the plaintiff on receipt of the price which he had actually paid to the vendors. As the defendant No 1 did not comply with this demand the present suit was brought.

The defendant No 1 alone contested the suit and the pleas taken by him in his written statement can be classified under four heads. In the first place, he denied that there was any custom of pre-emption amongst non Muslims in the city of Banaras as alleged by the plaintiff. The second plea taken was that even if there was any custom of pre-emption it could not be availed of in a case like this where neither the vendors nor the vendee were natives of or domiciled in Banaras but were residents of a different province. The third contention raised was that the plaintiff had not made the two demands in the proper manner as required by Muhammadan law and by reason of non compliance with the essential pre requisites to a claim for pre-emption the suit was bound to fail. Lastly, it was contended that as the plaintiff himself was the landlord of the property in suit and the vendors were his tenants he could not, under any law or custom, eject his own tenants by exercise of the right of pre-emption.

The Civil Judge who tried the suit held, on the evidence adduced in the case, that there was in fact a custom of pre-emption in the city of Banaras, the incidents of which were the same as in Muhammadan law. He held however that the custom being a local custom it could not be enforced against either the vendors or the vendee in the present case, as none of them were natives of or domiciled

in Banaras. The trial judge also found that the plaintiff did not make the requisite demands which are mandatory under Muhammadan law. The result was that the plaintiff's suit was dismissed and in view of the findings arrived at by him, the Civil Judge did not consider it necessary to decide the question as to whether the plaintiff being himself a landlord could assert any claim for pre-emption against his tenants on the basis of a custom.

Against this decision the plaintiff took an appeal to the High Court of Allahabad which was heard by a Division Bench consisting of Mulla and Yorke, JJ. The learned Judges agreed with the trial court in holding that although there was a custom of pre-emption in the city of Banaras, yet the necessary condition for enforcing the custom in that locality was that the vendor and the vendee must be natives of or domiciled in the city. As this condition was not fulfilled in this case the plaintiff's claim could not succeed. In the result the High Court affirmed the decision of the trial judge and dismissed the appeal. The other questions as to whether the plaintiff had made the demands in strict compliance with the rules of Muhammadan law and whether he could claim pre-emption against his own tenants on the basis of a right by custom were left undecided. The judgment of the High Court is dated the 29th August, 1944. After this, the plaintiff applied for leave to appeal to the Judicial Committee. This application was refused by the High Court but he got Special leave under an order of the Judicial Committee dated the 11th of December 1945. After the abolition of the jurisdiction of the Judicial Committee the appeal stood transferred to this court for disposal.

The contentions that have been raised before us by the parties to this appeal practically centre round one point. It is not disputed by either side that there is a custom of pre-emption in the entire city of Banaras, but whereas the respondents contend that the custom obtains exclusively amongst persons who are inhabitants of the city or are domiciled therein, the case of the appellant is that the custom admits of no such restriction or limitation and all those who own property in the city are governed by the custom, it being immaterial whether or not they are the natives of the place or are or are not resident owners. Various contentions have been raised by the learned counsel on both sides in support of their respective cases and we have been treated to an elaborate discussion regarding the nature of the right of pre-emption as is recognised in the Muhammadan law and the incidents that attach to it, when it is not regulated by law but is founded on custom said to be obtaining in a particular locality.

Before we examine the arguments that have been paced before us by the learned counsel appearing for the parties, it may be necessary to make a few general observations regarding the law or laws which govern the exercise of the right of pre-emption in India at the present day.

The Privy Council has said in more cases than one¹, that the law of pre-emption was introduced in this country by the Muhammadans. There is no indication of any such conception in the Hindu law and the subject has not been noticed or discussed either in the writings of the Smṛiti writers or in those of later commentators. Sir William Macnaghten in his *Principles and Precedents of Maho-*

¹ Vide *Jadulal v. Janki Koor*, (1912) 23 M.L.J. 28 L.R. 39 I.A. 101, 106 1 L.R. 39 Cal. 415 (P.C.), *D. Gamber Singh v. Ahmad*, (1914) 28 M.L.J. 556 L.R. 42 I.A. 10, 18 1 L.R. 37 All. 129 (P.C.)

medan Law (*vide* page 14) has referred to a passage in the *Mahāvārana Tantra* which, according to the learned author, implies that pre-emption was recognised as a legal provision according to the notions of the Hindus. But the treatise itself is one on mythology, not on law and is admittedly a recent production. No value can be attached to a stray passage of this character the authenticity of which is not beyond doubt.

During the period of the Mughal Emperors the law of pre-emption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Muhammadan rulers, and it was applied alike to Muhammadans and Zimmies (within which Christians and Hindus were included) no distinction being made in this respect between persons of different races and creeds.¹ In course of time the Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom is largely to be found in provinces like Bihar and Gujerat which had once been integral parts of the Muhammadan Empire.

Opinions differ as to whether the custom of pre-emption amongst village communities in Punjab and other parts of India was borrowed from the Muhammadans or arose, independently of the Muhammadan law, having its origin in the doctrine of 'limited right' which has always been the characteristic feature of village communities.² Possibly much could be said in support of either view and there is reason to think that even where the Muhammadan law was borrowed it was not always borrowed in its entirety. It would be useful to refer in this connection to the following observations of the Judicial Committee in *Digambar v. Ahmad*³

In some cases the tharers in a village adopted or followed the rules of the Mahomedan law of pre-emption and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases there is a custom of pre-emption exists each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption is doubtless in all cases the result of agreement amongst the shareholders of the particular village and may have been adopted in modern times and in villages which were first constituted in modern times.

It is not necessary for our present purpose to pursue this discussion any further.

Since the establishment of British rule in India the Muhammadan law ceased to be the general law of the land and as pre-emption is not one of the matters respecting which Muhammadan law is expressly declared to be the rule of decision where the parties to a suit are Muhammadans the courts in British India administered the Muhammadan law of pre-emption as between Muhammadans entirely on grounds of justice, equity and good conscience. Here again there was no uniformity of views expressed by the different High Courts in India and the High Court of Madras definitely held that the law of pre-emption, by reason of its placing restrictions upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good conscience.⁴ Hence the right of pre-emption is not recognised in the Madras Presidency at all even amongst Muhammadans except on the footing of a custom. Rights of pre-emption have in some provinces like Punjab, Agra and Oudh been embodied in statutes passed by the Indian Legislature and where the law has been thus codified it undoubtedly becomes the territorial law of the place and is applicable to persons

¹ *Vide Hamid on Hedaya* Vol. III p. 592.

² *Vide Dilsukh Ravi v. Natha Sahai*, P.R. 98 of 1891 (351).

³ (1914) 28 M.L.J. 556 L.R. 42 L.A. 10.

¹³ I.L.R. 37 A. 129 (P.C.)

⁴ *Vide Krishna Venon v. Keshavan*, (1897) I.L.R. 20 Mad. 303.

other than Muhammadans by reason of their property being situated therein. In other parts of India its operation depends upon custom and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Muhammadans as part of their personal law provided the Judiciary of the place where the property is situated does not consider such law to be opposed to the principles of justice, equity and good conscience. Apart from these a right of pre-emption can be created by contract and as has been observed by the Judicial Committee in the case referred to above, such contracts are usually found amongst sharers in a village. It is against this background that we propose to examine the contentions that have been raised in the present case.

The first question that has been mooted before us is, whether the burden and benefit of a right of pre-emption are incidents annexed to the lands belonging respectively to the vendor and the pre-emptor or is the right merely one of re-purchase, which a neighbour or co-sharer enjoys under Muhammadan law, and which he can enforce personally against the vendee in whom the title to the property has already vested by sale. The learned counsel for the appellant has pressed for acceptance of the first view while the Solicitor General appearing for the respondents has contended, that by no accepted principles of jurisprudence, can the pre-emptor be said to have an interest in the property of the vendor. It is pointed out that the right of pre-emption arises for the first time when there is a completed sale and the title of the purchaser is perfected and if the right was one attached to the property, it must have existed prior to the sale and should have been available not merely in case of sale but in all other kinds of transfer like gift and lease.

This latter line of reasoning found favour with the majority of a Full Bench of the Calcutta High Court in the case of *Sheikh Kudratulla v. Mohim Mohan*¹, where the question arose whether, when a Muhammadan sold his property to a Hindu purchaser the co-sharer of the former could enforce a right of pre-emption against the Hindu vendee under the Muhammadan law. The question was answered in the negative by the majority of the Full Bench and Mitter, J., who delivered the leading judgment, while discussing the nature of the right of pre-emption observed as follows:

If that right is founded on an antecedent defect in the title of the vendor, that is to say on a legal disability on his part to sell his property to a stranger, without giving an opportunity to his co-parceners and neighbours to purchase it in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property for although as a Hindu he is not necessarily bound by the Mahomedan law, he was at any rate bound by the rule of justice, equity and good conscience to inquire into the title of his vendor and that very rule also requires that we should not permit him to retain a property which his vendor had no power to sell. If on the contrary it can be shown that there was no such defect in the title of the vendor, or in other words that he was under no such disability even under the Mahomedan law itself it would follow as a matter of course, that there was no defect in the title of the purchaser at the time of its creation. Now so far as I can judge of the Mahomedan law of pre-emption from the materials within my reach, it appears to me to be perfectly clear that a right of pre-emption is nothing more than a mere right of re-purchase not from the vendor but from the vendee, who is treated for all intents and purposes, as the full legal owner of the property which is the subject matter of that right.*

The minority judges consisting of Norman and Macpherson, JJ., took a different view and held that the law of pre-emption was to be treated as a real law, that is

a law affecting and attaching to the property itself. The liability to the claim of pre-emption is a quality impressed upon and inherent in the property which is subjected to it, or in other words an incident of that property.

The identical point came up for consideration before a Full Bench of the Allahabad High Court¹, where also the question for decision was whether a Muhammadan pre-emptor could enforce his right against a Hindu vendee from a Muhammadan vendor. The learned Judges took a view, contrary to that taken by the majority of the Calcutta Full Bench and answered the question in the affirmative. It was held that the right of pre-emption was not one of re-purchase from the vendee. It was a right inherent in the property and hence could be followed in the hands of the purchaser whoever he might be. Mr Justice Mahmood elaborately reviewed all the original authorities of Muhammadan law on the point and expressed the opinion that the right of pre-emption under Muhammadan law partakes strongly of the nature of an easement right, the 'dominant tenement' and the 'servient tenement' of the law of easement being analogous to what the learned Judge described respectively as the 'pre-emptive tenement' and 'pre-emptual tenement'. In other words the right of pre-emption is a sort of legal servitude running with the land. The right exists, as the learned Judge said, in the owner of the pre-emptive tenement for the time being which entitles him to have an offer of sale made to him whenever the owner of the pre-emptual property desires to sell it. But the right could not be a right of re-purchase either from the vendor or the vendee involving a new contract of sale.

It is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is in effect, as if in a sale deed the vendee's name was rubbed out and the pre-emptor's name was substituted in its place.

The learned Judge pointed out that the decision of the Calcutta Full Bench was based upon a mis translation of the Arabic word "Tajibo" in Hamilton's Hedaya. Hamilton translated the word as meaning 'established' but it really means "becomes obligatory, necessary or enforceable". The right has not got to be established at all. It is attached and continues to be attached to the tenement concerned and can under certain circumstances be enforced forthwith against the adjoining tenements sold.

This decision was followed by the Patna High Court in *Achyutananda v. Bihari*². A Division Bench of the Bombay High Court in a case decided in 1928³ accepted the view taken by the majority of the Calcutta Full Bench but the reasons given in that decision were held to be unsupportable by a later Full Bench⁴ of the same High Court which held the right of pre-emption to be an incident of property and agreed substantially with the view taken by Mahmood, J, in the Allahabad Full Bench.

In our opinion it would not be correct to say that the right of pre-emption under Muhammadan law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same. We prefer to accept the meaning of the word "Tajibo" used in the

1 Vide *Gorinda Dyal v. Jayantula*, (1883) I L.R. 53 Bom. 323.

I L.R. 7 All. 775 (F.B.)

2 (1922) I L.R. 1 Pat. 518.

3 Vide *Hamed Mija v. Benwaris*, (1928)

4 Vide *Dasharathul v. Bai Dhandu Bai*, I L.R. (1941) Bom. 460.

Hedaya in the sense in which Mr Justice Mahmood construes it to mean and it was really a mis translation of that word by Hamilton that accounted to a great extent for the view taken by the Calcutta High Court. It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. We agree with Mr Justice Mahmood that the sale is a condition precedent not to the existence of the right but to its enforceability. We do not however desire to express any opinion on the view taken by the learned Judge that the right of pre-emption partakes strongly of the character of an easement in law. Analogies are not always helpful and even if there is resemblance between the two rights, the differences between them are no less material. The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. It may be stated here that if the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a *bona fide* purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the right could be enforced at the present day. In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

The question now arises as to what is the legal position when the right is claimed not under Muhammadan law but on the footing of a custom. It cannot be and is not disputed that if the right of pre-emption is set up by non-Muslims on the basis of a custom, the existence of the custom, like that of a right established by proper evidence. But as has been laid down by the Judicial Committee¹ following the decision of the Calcutta High Court in *Fakir Ratan v. Emman*², that when the existence of a custom under which the Hindus claim to have the same rights of pre-emption as Muhammadans, in any district is generally known and judicially recognised, it is not necessary to prove it by further evidence. A long course of decisions has established the existence of such custom in Bihar, Sylhet and certain parts of Gujarat.

So far as the present case is concerned, a large number of judgments have been put in evidence by the plaintiff in proof of the existence of a custom of pre-

¹ Vide *Jadulal v. Janki Koor* (1912) 23 M.L.J. 28 L.R. 39 I.A. 101 I.L.R. 39 Cal. 915 (P.C.)

² (1863) B.L.R. Sup. Vol. 30 1

emption in the entire city of Banaras. There are at least three reported cases¹ in which the High Court of Allahabad has affirmed the existence of such rights in Banaras. The defendants in the present case do not dispute the existence of the custom and the whole dispute is as regards the incidents of the same, the defendants' case being that the custom is available as between persons who are natives of or domiciled in the place and cannot be extended to an outsider even though he own property in the city which is the subject-matter of the claim.

The Privy Council in *Jadulal v. Janki Koor*² expressly laid down that when a custom of pre-emption is established by evidence to prevail amongst non Muslims in a particular locality

'It must be presumed to be founded on and co-extensive with the Muhammadan law on that subject unless the contrary is shown, that the court may as between Hindus administer a modification of the law as to the circumstances under which the right may be claimed when it is shown that the custom in that respect does not go to the whole length of the Muhammadan law of pre-emption, but that the assertion of right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan law which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record.

In the case before us no attempt was made by the defendants to show that the custom of pre-emption set up and proved by the plaintiff was of a character different from that which is contemplated by Muhammadan law. The only difference that is noticed in one of the decided authorities³ is that the custom of pre-emption prevalent in the city of Banaras is confined to house properties only and does not extend to vacant lands but this view again has been modified in a subsequent decision⁴ which held that building sites and small parcels of land even though vacant are not excluded from the ambit of the custom. The various judgments which have been made exhibit in this case do not give any indication whatsoever that under the custom, as it prevails in the city of Banaras, pre-emption could be claimed only against persons who are the inhabitants of the place or are domiciled therein and that it could not be enforced in respect of a property situated in the city, the owner of which is not a native of that place. In fact no such question was raised or discussed in any of these cases. The ambit or extent of a custom is a matter of proof and the defendants were certainly competent to adduce evidence to show that the custom of pre-emption prevailing in the city of Banaras was available not against all persons who held lands within it but only against a particular class of persons. But this they did not attempt to do at any stage of the litigation. Their contention, which has been accepted by both the courts below is, that as a matter of law, a local custom of pre-emption does not affect or bind persons who are not the natives of or domiciled in that area. In support of this proposition the courts below have relied primarily upon the statement of law made by Roland Wilson and other text book writers on Muhammadan law which purport to be based upon certain decided authorities.

At page 391 of his book on Anglo-Muhammadan Law⁵ Roland Wilson states the law in the following manner

1. *Vide Chatterjee Doss v. Sankar Doss*, (1906) I.L.R. 28 All. 590, *Ram Chand Khanna v. Ganesu Ram Puri*, (1913) I.L.R. 45 All. 501, *Gouri Sankar v. Sankar*, (1931) I.L.R. 54 All. 76.
2. (1912) 23 M.L.J. 23 I.L.R. 39 I.A. 10 I.L.R. 39 Cal. 915 (P.C.)

3. *Vide Ram Chand Khanna v. Ganesu*, (1923) I.L.R. 43 All. 501.

4. *Vide Gouri Sankar v. Sankar*, (1931) I.L.R. 54 All. 76.

5. *Vide* G.H. Ganesu, paragraph 332.

Where the custom is judicially noticed as prevailing amongst non Muhammadans in a certain local area it does not govern non Muhammadans who though holding land therein for the time being are neither natives of nor domiciled in the district

Two cases have been referred to in support of this proposition, one of which is *Bygnath Pershad v Kapilmon Singh*¹ and the other *Parsashth Nath Tewari v Dhanai*². Mulla repeats the law almost in the same terms in his Muhammadan Law. In 'Tyabji' the rule is thus laid down³

The law of pre-emption is personal. It is not territorial nor an incident of property. A person who is not a native of or domiciled with in a locality where pre-emption is enforced by law or custom but who owns lands within the same locality will not necessarily be subject to the law of pre-emption.

This statement clearly indicates the foundation of the whole doctrine. The law of pre-emption is stated to be a purely personal law even when it rests on custom. It is no incident of property and the right which it creates is enforceable only against persons who belong to a particular religious community or fulfil the description of being natives of a particular district. In the case of *Bygnath Pershad v Kapilmon Singh*¹, which can be said to be the leading pronouncement on the subject, the vendor of a house situated in the town of Arah, in the province of Bihar was one Rajani Kanta Banerjee who was a native of Lower Bengal but resided at Arah where he carried on the profession of a lawyer. Rajani Kanta sold the property to the defendant, and the plaintiff brought a suit claiming pre-emption on the ground of vicinage. It was admitted that the custom of pre-emption did prevail amongst non Muslims in Bihar, but still the suit was dismissed on the ground that the vendor, who was not a native of the district, was not bound by it. The right of pre-emption, it was held, arises from a rule of law by which the owner of the land is bound and it no longer exists if he ceases to be an owner, who is bound by the law either as a Muhammadan or by custom.

In our opinion the decision proceeds upon a wrong assumption. The right of pre-emption, as we have already stated, is an incident of property and attaches to the land itself. As between Muhammadans the right undoubtedly arises out of their personal law but that is because the law of pre-emption is no part of the general law in India. Muhammadans live scattered all over our country and unless the right of pre-emption is regarded as part of their personal law they would lose the benefit of it altogether. Hence if a Muhammadan owns land in any local area and has co-sharers or neighbouring proprietors who are also Muhammadans, a right of pre-emption would accrue to the latter under the personal law of the Muhammadans, which is enforced in this country since the British days on grounds of equity, justice and good conscience. But though arising out of personal law the right of pre-emption is not a personal right, it is a real right attaching to the land itself. When the right is created by custom it would be, as the Privy Council has said co-extensive with the right under Muhammadan law unless the contrary is proved. This means that the nature and incidents of the right are the same in both cases. In both it creates a right in the property and not a mere personal claim against the vendor or the vendee and the essential pre-requisites to the exercise of the right and the terms of enforcement are identical in both. But this does not mean that the customary right must be personal to the inhabitants of a particular locality. It may be so, if that is the incident of the

¹ (1875) 24 WR 95

² (1905) 1 LR 32 Cal 983

³ Tyabji's Muhammadan Law page 670, paragraph 523 (c)

custom itself as established by evidence, but not otherwise. Under Muhammadan law the right is confined to persons of a particular religious persuasion because it has its origin in the Muhammadan law which is no longer a law of the land. But when it is the creature of a custom, the religious persuasion of the parties or the community to which they belong are altogether immaterial. All that is necessary to prove in such cases is that the right of pre-emption is recognised in a particular locality and once this is established, the land belonging to every person in the locality would be subject to the custom, irrespective of his being a member of a particular community or group. The whole doctrine, as enunciated above, is based upon the fallacious assumption that the right of pre-emption is a personal right arising out of certain personal conditions of the parties like religion, nationality or domicile and this fallacy crept into our law simply because the right of pre-emption as between Muhammadans is administered as a part of their personal law in our country.

The correct legal position must be that when a right of pre-emption rests upon custom it becomes the *lex loci* or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself.

It appears that the decision in *Byjnath v Kapilmon Singh*¹, which was quite in accordance with the view then taken by the High Court of Calcutta about the nature of the right of pre-emption, was the basis of the statement of law in the form set out above in an earlier edition of Roland Wilson's book. The decision in *Parsashth Nath v Dhanai*², which is the other authority referred to, is based entirely upon the statement of law in that earlier edition, and does not carry the matter any further. In our opinion these decisions cannot be held to be correct and the contention of the learned counsel for the appellant should be given effect to. We accordingly hold that a local custom of pre-emption exists in the city of Banaras and the right attaches at least to all house properties situated within it and no incident of such custom is proved which would make the right available only between persons who are either natives of Banaras or are domiciled therein. The result is that the appeal is allowed and the judgments of both the Courts below are set aside. The case shall go back to the High Court for consideration of the two questions left undecided by it, namely, whether the plaintiff has made the demands in due compliance with the forms prescribed by the Muhammadan law and secondly whether the plaintiff, being a Muhammadan, could reject his own claims in exercise of the right of pre-emption. The appellant will have the costs of this appeal from Respondent No. 1. Further costs will abide the result.

Appeal allowed

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B. K. MUKHERJEA, VIVIAN BOSE, N. H. BHAGWATI AND T. L. VENKATARAMA AYYAR, JJ.

Wazir Chand

*Appellant**

v.

The State of Himachal Pradesh and
The District Magistrate, Chamba*Respondents*

AND

Wazir Chand and another

*Appellants**

v.

The State of Himachal Pradesh,
The District Magistrate, Chamba and
The Station House Officer, Kotwali, Chamba*Respondents.*

Constitution of India (1950), Articles 19 and 31—Seizure without following proper procedure of goods belonging to a person in Chamba in Himachal Pradesh, with the help of the Chamba police by the Kashmir police investigating an alleged offence committed in Jammu and Kashmir—Infringement of fundamental rights for which relief should be granted under Article 226

T.N. was running a business in Chamba in Himachal Pradesh for the extraction, collection and export of medicinal herbs in the year 1949. He was a partner of Messrs P.D. and G.S. of Jammu and Kashmir State in timber business carried on in that State. It was alleged by T.N. that the business in Chamba was his exclusive business with which the partnership firm in Jammu and Kashmir had no concern whatever. P.D.'s case was that the business in Jammu and Kashmir was started by him in 1943 as his sole proprietary concern, that later on, he took T.N. as a partner in the concern that in the year 1949 that forest lease was taken in the name of T.N. for the business in Chamba but the finances for this undertaking was provided by the firm at Jammu. It was alleged that subsequently T.N. manipulated the Jammu books showing a bogus investment of his elder brother W.C. amounting to Rs. 30,000 in the firm at Jammu and that by fraudulently and by manipulating the books and by entering into certain agreements, T.N. made W.C. the sole owner of the Chamba business and transferred the Chamba concern to him without the knowledge of the other partners. These assertions were not accepted by W.C. and T.N. Their case was that T.N. was the sole owner of the Chamba concern, that he obtained the leases in his own name and for the Jammu firm from the Chamba forest department first in 1949 and then in the year 1950 that as he had no capital of his own he borrowed the sum of Rs. 30,000 from his brother and made him a partner with him in this business and that as later on he was unable to contribute his share of the capital, the partnership was dissolved on 31st August, 1950 and in consideration of a sum of Rs. 20,000 he, T.N., relinquished and transferred by means of a stamp deed of dissolution made on 10th December, 1950, all his rights in the Chamba concern to W.C. who thus became the sole owner of all the goods belonging to this concern in Chamba and came into possession of the same.

On 3rd April, 1951, P.D. lodged a report with the police at Jammu that T.N. had prepared day-books for production before the income tax authorities and that he had committed an offence of embezzlement under section 406 of the Indian Penal Code. The Jammu and Kashmir Government took cognizance of the case and appointed A.A. sub-inspector of police to make investigations. In the course of investigation the Jammu police came to Chamba on 25th and 26th April, 1951 and as the Privy Council of the Chamba police seized 269 bags of medicinal herbs worth about Rs. 35,000 law unless the physical possession of W.C. or his men without reporting to, or obtaining orders from the right authorities or any other competent authority. W.C. protested against the action and asked that he be released but his representations had no effect. In the first week of July, 1951, again, at the instance of the Jammu police, seized 25 bags of *dhup* from and in pre requisites to. On the 19th July, 1951, the District Magistrate of Jammu wrote to the District Magistrate of Chamba asking that the goods seized from the Chamba concern be handed over to the inhabitants of a private police. This request was not complied with.

On 21st August, 1951, *W C* made an application under Article 226 of the Constitution of India to the Judicial Commissioner of the State of Himachal Pradesh at Simla praying for the issue of one or more writs in the nature of *mandamus* directing the respondents to order release of the seized goods and to refrain from passing any orders about the extradition of these goods. During the pendency of the petition another 45 mounds of medicinal herbs were seized by the Chamba police at the instance of the Jammu police. This seizure was challenged by petition on 20th September 1951, under Article 226 of the Constitution. The Judicial Commissioner declined to grant any of the reliefs. On appeals by special leave,

Held, in order to determine the legality of the seizure and to determine the point whether there had been any infringement of the petitioners' fundamental rights it is not necessary to determine the true nature of the title in the goods seized. The determination of the question whether *W C* had obtained possession fraudulently is not relevant to this inquiry. The only point that needs consideration is whether the seizures were under authority of law or otherwise, and if they are not supported under any provisions of law a writ of *mandamus* should be issued directing the restoration of the goods so seized.

It is doubtful whether in view of the provisions of Article 370 of the Constitution any offence committed in Jammu and Kashmir could be investigated by an officer in-charge of a police station in the Himachal Pradesh. The Jammu police had no jurisdiction or authority whatsoever to carry out investigation without the authority of any law or under the orders of any magistrate passed under authority of any law. That being so the seizure of the goods from the possession of *W C* or his servants amounted to an infringement of his fundamental rights both under Article 19 and Article 31 of the Constitution and relief should be granted to him under Article 226 of the Constitution.

Appeals by special leave granted by the Supreme Court by its Order dated the 29th January, 1952, from the Judgment and Order dated the 26th December, 1951, of the Court of the Judicial Commissioner for the State of Himachal Pradesh at Simla in Civil Miscellaneous Petitions Nos. 12 and 16 of 1951.

Achhru Ram, Senior Advocate (*P S Safer* and *Harbans Singh*, Advocates, with him) for Appellants.

C K Daphlary, Solicitor General for India (*R Ganapathy Iyer*, Advocate, with him) for Respondent No. 1.

The Judgment of the Court was delivered by

Mahajan, C J—These are two connected appeals by special leave against an order of the Judicial Commissioner Himachal Pradesh dated the 26th December, 1951, rejecting two applications for the issue of writs of *mandamus* and *certiorari* under Article 226 of the Constitution.

The facts giving rise to the two petitions, out of which these two connected appeals arise, are these. One *Trilok Nath* was running a business in Himachal Pradesh under the name and style of "Himachal Drug Nurseries" for the extraction, collection and export of medicinal herbs in the year 1949. He was a partner of Messrs. *Prabhu Dayal* and *Gowri Shanker* of Jammu and Kashmir State in timber business carried on in that State under the name and style of "The Kashmir Woods". It was alleged by them that the business in Chamba was his exclusive business with which the partnership firm "The Kashmir Woods" had no concern whatsoever. *Prabhu Dayal's* case was that the firm "The Kashmir Woods" was started by him in 1943 as his sole proprietary concern, that later on he took *Trilok Nath Mahajan* as a partner in this concern, that in the year 1949 *Sardar Bhagwan Singh* induced the partners of this firm to take up the line of crude drugs and herbs which was his line, that a new firm "Himachal Drug Nurseries" was started as a child concern of "The Kashmir Woods" with *Bhagwan Singh* as one of the partners, that after preliminary investigation it was decided to take up this work at Chamba and in pursuance of this decision two leases of two

forest divisions were taken on behalf of the Jammu firm, one in the name of Bhagwan Singh and another in the name of Trilok Nath but the finance for this undertaking was supplied by the parent firm at Jammu. It was alleged that subsequently Trilok Nath manipulated the Jammu books showing a bogus investment of his elder brother Wazir Chand amounting to Rs 30,000 in the firm "Kashmir Woods" and that fraudulently and by manipulating the books and by entering into certain agreements Trilok Nath made Wazir Chand the sole owner of "Himachal Drug Nurseries" and transferred the Chamba concern to him without the knowledge of the other partners. These assertions were not accepted by Wazir Chand or Trilok Nath. Their case was, that Trilok Nath was the sole owner of the Chamba concern, that he obtained the leases in his own name and not for the Jammu firm from the Chamba forest department, first in the year 1949, and then in the year 1950, that as he had no capital of his own, he borrowed a sum of Rs 30,000 from his brother and made him a partner with him in this business and that as later on he was unable to contribute his share of the capital, the partnership was dissolved on 31st August, 1950, and in consideration of a sum of Rs 20,000 he, Trilok Nath, relinquished and transferred by means of a stamped deed of dissolution made on 10th December, 1950, all his rights in the Chamba concern to Wazir Chand who thus became the sole owner of all the goods belonging to this concern in Chamba and came into possession of the same.

On the 3rd April, 1951, Prahu Dayal lodged a report with the police at Jammu that Trilok Nath had prepared duplicate accounts for production before the income-tax authorities, and that he had committed an offence of embezzlement under section 406 of the Indian Penal Code. The Jammu and Kashmir State police took cognizance of the case and appointed Amar Nath, sub-inspector of police, to make investigation. During the investigation the Jammu police came to Chamba on 25th and 26th April, 1951 and with the assistance of the Chamba police seized 269 bags of medicinal herbs worth about Rs 35,000 and in actual physical possession of Wazir Chand or his men without reporting to, or obtaining orders from, any magistrate or any other competent authority. The goods were handed over to different superdars at different stations in the State of Himachal Pradesh. Wazir Chand vehemently protested against these seizures alleging that the action taken was illegal and without jurisdiction and that the goods should be released but his representations had no effect.

In the first week of July, 1951, the Chamba police again, at the instance of the Jammu police, seized 25 bags of *dhup* from and in the possession of Wazir Chand and these were also handed over to the same superdars. On the 19th July, 1951, the District Magistrate of Jammu wrote to the District Magistrate of Chamba asking that the goods seized from the "Himachal Drug Nurseries" be handed over to the Jammu and Kashmir State police. This request has so far not been complied with.

On the 21st August, 1951, Wazir Chand made an application under Article 226 of the Constitution of India to the Judicial Commissioner of the State of Himachal Pradesh at Simla praying for the issue of one or more writs in the nature of *mandamus* directing the respondents to order the release of the seized goods and to refrain from passing any orders about the extradition of these goods. During the pendency of this petition another 45 maunds of medicinal herbs were seized by the Chamba police at the instance of the Jammu police. This seizure was challenged

by a second petition on 20th September, 1951, under Article 226 of the Constitution

The Judicial Commissioner disposed of both these petitions by a single judgment. He declined to grant any of the reliefs asked for by the appellant. The ground of the decision appears from the following quotation from his judgment—

“In order to find whether the entries in those books of account were genuine or forged or what the effect of those entries on the alleged right of Wazir Chand was or whether the agreements set up by Wazir Chand were genuine or for consideration it would be necessary that all these persons, and such witnesses as they might deem it necessary to produce in support of their respective allegations should appear in the witness box. A number of affidavits have been filed on behalf of either party—those of Wazir Chand and certain alleged employees of the Himachal Drug Nurseries on behalf of the petitioners, and of Prabhu Dayal, Gaur Shankar, Bhagwan Singh and a head constable of the Jammu and Kashmir police on behalf of the respondents, but the truth or falsity of the contents of those affidavits cannot be ascertained without the deponents being subjected to cross-examination. . . I would not go so far as to hold that the petitioners have failed to prove that they have any right title or interest in the goods seized. It will not be far to do so in the present summary proceedings. But this much must certainly be said that it is not possible for this Court, on the material placed before it, or which could possibly be placed in these summary proceedings, to come to a finding whether the petitioners have the right to claim the reliefs prayed for by them. The proper remedy for them therefore is not by way of a petition under Article 226 of the Constitution of India, but by any other action e.g., a civil suit, which may be open to them.”

It was contended before us that the learned Judicial Commissioner was in error in thinking that in order to determine the legality of the seizures and to determine the point whether there had been any infringement of the petitioner's fundamental rights it was necessary to determine the true nature of the title in the goods seized and that the petitioner could not be granted any relief till he was able to establish this. It was argued that the goods having been seized from the actual possession of the petitioner or his servants, the Chamba concern, being admittedly under the exclusive control of Trilok Nath or Wazir Chand, the determination of the question whether Wazir Chand had obtained possession fraudulently was not relevant to this inquiry, and that the only point that needed consideration was whether the seizures were under authority of law or otherwise, and if they were not supported under any provisions of law, a writ of *mandamus* should have issued directing the restoration of the goods so seized.

It seems to us that these contentions are well founded. The Solicitor General appearing for the respondents was unable to draw our attention to any provision of the Code of Criminal Procedure or any other law under the authority of which these goods could have been seized by the Chamba police at the instance of the Jammu police. Admittedly these seizures were not made under the orders of any magistrate. The provisions of the Code of Criminal Procedure authorizing the Chamba police to make a search and seize the goods are contained in sections 51, 96, 98 and 163. None of these sections however has any application to the facts and circumstances of this case. Section 51 authorizes in certain circumstances the search of arrested persons. In this case no report of the commission of a cognizable offence had been made to the Chamba police and no complaint had been lodged before any magistrate there and no warrant had been issued by a Chamba magistrate for making the search or for the arrest of any person. That being so, sections 51, 96 and 98 had no application to the case. Section 163 again is not attracted to the circumstances of this case because it provides that if an officer in charge of a police station has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate, may

be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station. The Chamba police was not authorized to investigate the offence regarding which a report had been made to the Jammu and Kashmir police. It is doubtful whether in view of the provisions of Article 370 of the Constitution any offence committed in Jammu and Kashmir could be investigated by an officer in charge of a police station in the Himachal Pradesh. The procedure prescribed by the section was not followed. The Jammu and Kashmir police had no jurisdiction or authority whatsoever to carry out investigation of an offence committed in Jammu and Kashmir in Himachal territory without the authority of any law or under the orders of any magistrate passed under authority of any law. No such authority was cited before us. The whole affair was a hole and-corner affair between the officers of the Kashmir police and of the Chamba police without any reference to any magistrate. It is obvious that the procedure adopted by the Kashmir and the Chamba police was in utter violation of the provisions of law and could not be defended under cover of any legal authority. That being so, the seizure of these goods from the possession of the petitioner or his servants amounted to an infringement of his fundamental rights both under Article 19 and Article 31 of the Constitution and relief should have been granted to him under Article 226 of the Constitution.

All that the Solicitor General could urge in the case was that on the allegation of Prabhu Dayal, the goods seized in Chamba concerned an offence that had been committed in Jammu and being articles regarding which an offence had been committed, the police was entitled to seize them and that Wazir Chand had no legal title in them. Assuming that that was so, goods in the possession of a person who is not lawfully in possession of them cannot be seized except under authority of law, and in absence of such authority, Wazir Chand could not be deprived of them. On the materials placed on this record it seems clear that unless and until Prabhu Dayal proved his allegations that the Chamba concern was part and parcel of the Jammu partnership firm (which fact has been denied) and that Trilok Nath who was admittedly one of the partners had no right to put Wazir Chand in possession of the property, no offence even under section 406 could be said to have been committed about this property. The Jammu police without having challanned any of the accused before a magistrate in Jammu, and without having obtained any orders of extradition from a magistrate (if the offence was extraditable) could not proceed to Chamba and with the help of the Chamba police seize the goods and attempt to take them to Jammu by a letter of request written by the District Magistrate of Jammu to the District Magistrate of Chamba.

Lastly it was argued that the petitioner made an application under section 523, Criminal Procedure Code, to the magistrate and that application was dismissed and that a petition for revision against that order was still pending, and that when another remedy had been taken Article 226 could not be availed of. This contention cannot be sustained, firstly in view of the fact that section 523 has no application to the facts and circumstances of this case, and the magistrate had no jurisdiction to return these goods to the petitioner. Secondly, the revision

application has been dismissed on the ground that there was no jurisdiction in this case to grant relief to the petitioner under section 523

For the reasons given above we allow this appeal, set aside the order of the Judicial Commissioner and direct an appropriate writ to issue directing the restoration to the petitioner of the goods seized by the police. The appellant will have his costs of the appeals and those incurred by him in the Court of Judicial Commissioner

Agent for Respondent No 1 *R H Dhebar*

Appeal allowed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Dinabandhu Sahu

*Appellant**

v

Jadumoni Mangaraj and others

Respondents

Representation of the People Act (XLIII of 1951) sections 81, 83 (1), 85, and 90 (4)—Scope—Election petition sent by registered post reaching the Election Tribunal at Delhi one day beyond the period prescribed—Discretion to condone delay—If can be exercised suo motu—Verification of petition defective—Order for amendment—Discretion to pass—Interference with by Court—Constitution of India 1950 Article 136—Appeal under—Scope

The Supreme Court does not, when hearing appeals under Article 136 act as a Court of further appeal on facts and does not interfere with findings given on a consideration of the evidence, unless they are perverse or based on no evidence. This is particularly so when the findings under challenge are those of Election Tribunals. Where the findings that a candidate for election got another candidate to withdraw on a promise to get him employment and that he had used a bus for conveying voters to the polling booths are supported by the evidence, they are not open to attack in an appeal to the Supreme Court under Article 136 of the Constitution.

The proviso to section 83 of the Representation of the People Act (1951) does not contemplate the Election Commission on giving to the respondent notice of the petition for condonation of the delay (in presenting an election petition), or the holding of an enquiry as to the sufficiency of the grounds in his presence before passing an order under it. The policy underlying the provision is to treat the question of delay as one between the Election Commission and the petitioner and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. The scope of the power conferred on the Election Tribunal under section 90 (4) is that it overrides the power conferred on the Election Commission under section 83 to dismiss the petition. It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 83 of the Act. If the Election Commission can pass a final order condoning delay without notice to the respondent there is no reason why it should not pass such an order *suo motu*. In this respect, the position under the proviso to section 83 is materially different from that under section 5 of the Limitation Act under which an order excusing delay is not final and is liable to be questioned by the respondent at a later stage.

The effect of an order under section 90 (4) by the Election Tribunal declining to dismiss the petition on the ground of delay or defective verification is clearly to condone those defects. It is a matter of discretion with the Election Tribunal either to dismiss the petition for defective verification or not. Where the Election Tribunal directed the verification to be amended and further declined to dismiss the petition under section 90 (4) for defective verification the Court will not interfere in an appeal under Article 136 of the Constitution.

Appeal by special leave granted by the Supreme Court of India by its Order dated the 11th December, 1953, from the Judgment and Order dated the 16th

November, 1953, of the Election Tribunal, Cuttack, in Election Case No 4 of 1952

A S K Iyengar, Senior Advocate (*V A Sethu*, *B K P Sinha*, *S B Jathar* and *S S Shukla*, Advocates, with him) for Appellant

S P Sinha, Senior Advocate (*R Patnaik* and *R G Prasad*, Advocates, with him) for Respondent No 1

J N Bannerji, Senior Advocate (*R Patnaik* and *Ratnaparkhi Anant Govind*, Advocates, with him) for Respondent No 2

The Judgment of the Court was delivered by

Venkatarama Ayyar, J—This is an appeal by special leave against the order of the Election Tribunal, Cuttack, setting aside the election of the appellant to the Legislative Assembly, Orissa, from the Kendrapara Constituency. Four persons, the appellant and respondents 1 to 3 were duly nominated for election to the seat. One of them Loknath Das (the third respondent herein), withdrew his candidature, leaving the contest to the other three. At the election which was held between 9th and 15th January, 1952, the appellant secured the largest number of votes and was declared elected. The respondent, Jadumoni Mangaraj, then presented a petition under section 81 of the Representation of the People Act (Act No XLIII of 1951) alleging various corrupt practices on the part of the appellant, and praying that the election might be set aside. The last date for presenting the petition was 4th April 1952. It was delivered at the post office at Cuttack on 3rd April, 1952, for being sent by registered post, and actually reached the Election Commission at Delhi on 5th April, 1952, a day beyond the period prescribed. It was also defective in its verification. Section 83 (1) of the Act enacts that the petition should be verified in the manner laid down in the Civil Procedure Code for the verification of the pleadings. Order 16, rule 15 sub-clause (2) of the Civil Procedure Code provides that 'the person verifying shall specify by reference to the numbered paragraphs of the pleading what he verifies on his own knowledge and what he verifies upon information received and believed to be true'. The verification in the petition did not specify which of the paragraphs were verified on personal knowledge and which, on information received and believed to be true. On 2nd July, 1952, the Election Commission passed an order condoning the delay in the presentation of the petition. By another communication dated 3rd July, 1952, it drew the attention of the petitioner to the defect in the verification and suggested that he might apply to the Tribunal for amending it. On 15th July, 1952, an order was passed under section 86 of the Act appointing the Election Tribunal, Cuttack, for the hearing of the petition. The petitioner then applied to the Election Tribunal for amending the verification. That was ordered, and the verification was amended on 24th July, 1952 so as to conform to the prescriptions laid down in Order 16, rule 15 (2), Civil Procedure Code.

In the written statement filed by the appellant, he raised the contention that as the petition was presented out of time and as the verification was defective, it was liable to be dismissed by the Election Commission under section 85 of the Act, and that, in consequence, the Election Tribunal ought to dismiss it as not maintainable. Disagreeing with this contention, the Election Tribunal proceeded to hear the petition on the merits, and by its judgment, dated 16th November

1953 it held by a majority that three of the corrupt practices set out in the petition had been established against the appellant. They were (1) that the appellant had, in violation of section 123 (1) of the Act, induced the third respondent to withdraw from the election on a promise to get him employment, (2) that he had, in breach of section 123 (6) of the Act, used Bus No. O.R.C. 1545 for conveying the electors to polling booths, and (3) that he had, in contravention of section 123 (8) of the Act, obtained the assistance of Extra Departmental Agents in branch post offices and of Presidents of Choudidari Union in canvassing for him in the election, they being in the view of the Election Tribunal, Government servants as defined in that provision. On these findings, the Election Tribunal passed an order setting aside the election of the appellant. The matter now comes before us on special leave under Article 136 of the Constitution.

It is obvious that any one of these findings, if accepted, would be sufficient to support the order of the Election Tribunal. With reference to the last of the findings, it is possible to urge with some force that Extra Departmental Agents and Presidents of Choudidari Union are not, having regard to their functions, Government servants, and that accordingly there was no contravention of section 123 (8). But the position is different as regards the other two findings. They are pure questions of fact, depending on appreciation of evidence. Mr. Krishnaswami Aiyangar, learned counsel for the appellant, argued that the conclusions of the majority were not justified by the evidence on record, and that the findings of the third member in his dissentient opinion, were the right ones to come to. But this Court does not, when hearing appeals under Article 136, sit as a Court of further appeal on facts, and does not interfere with findings given on a consideration of the evidence, unless they are perverse or based on no evidence. This is particularly so, when the findings under challenge are those of Election Tribunals. The findings in this case that the appellant got the third respondent to withdraw on a promise to get him employment, and had used Bus No. O.R.C. 1545 for conveying voters to the polling booths, are supported by the evidence, and cannot be characterised as perverse, and are therefore not open to attack in this appeal.

In this view, counsel for the appellant concentrated on the issues relating to the maintainability of the petition. He contended that as the petition was not presented within the time as required by section 81 of the Act, it was liable to be dismissed under the mandatory provision in section 83, and that when the matter came before the Election Tribunal, its jurisdiction was only to pass the order which the Election Commission ought to have passed, and that the petition should accordingly have been dismissed *in limine* as not maintainable. The proviso to section 83 of the Act runs as follows:

Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may in its discretion condone such failure.

It was in exercise of the discretion vested in it under this provision that the Election Commission condoned the delay by its order, dated 2nd July, 1952. It is not disputed that if this order is valid, there can be no question of dismissing the petition on the ground of delay. The contention of Mr. Krishnaswami Aiyangar is that the order is not valid, because it was passed not on any application of the party praying that the delay might be excused but *suo motu*, and such an appli-

cation, it is contended, is a condition to the exercise of jurisdiction under that proviso. Support for this contention was sought in the decisions under section 5 of the Limitation Act, holding that it was incumbent on the party praying that delay might be excused under that section to clearly allege and strictly prove the grounds therefor. We are not impressed by this contention. As was pointed out by this Court in *Jagan Nath v Jaswant Singh*,¹ the rights under litigation in these proceedings are not common law rights but rights which owe their existence to statutes, and the extent of those rights must be determined by reference to the statutes which create them. The proviso to section 85 does not contemplate the Election Commission giving to the respondent notice of the petition for condonation of the delay, or the holding of an enquiry as to the sufficiency of the grounds in his presence before passing an order under it. The policy underlying the provision is to treat the question of delay as one between the Election Commission and the petitioner, and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. Under section 90 (4) of the Act, when the petition does not comply with the requirements of section 81, section 83 or section 117, the Election Tribunal has a discretion either to dismiss it or not 'notwithstanding anything contained in section 83.' The scope of the power conferred on the Election Tribunal under section 90 (4) is that it overrides the power conferred on the Election Commission under section 85 to dismiss the petition. It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 85 of the Act. The words of section 90 (4) are, it should be marked 'notwithstanding anything contained in section 83' and not 'notwithstanding anything contained in section 85 or any order passed thereunder.' An order of the Election Commission under section 85 dismissing a petition as barred will, under the scheme of the Act, be final, and the same result must follow under section 90 (4) when the order is one excusing the delay. Section 90 (4) will be attracted only when the Election Commission passes the petition on to the Tribunal without passing any order under section 85. If the Election Commission can thus pass a final order condoning delay without notice to the respondent there is no reason why it should not pass such an order *suo motu*. In this respect, the position under the proviso to section 85 is materially different from that under section 5 of the Limitation Act, under which an order excusing delay is not final, and is liable to be questioned by the respondent at a later stage. [Vide the decision of the Privy Council in *Arishnasami Panikondar v Ramasami Chelthar*.²]

It was argued that in this view the respondent would be without remedy even if the Election Commission should choose to condone delays—it might be of years—and that that would result in great hardship. But the proviso advisedly confers on the Election Commission wide discretion in the matter, and the obvious intention of the legislature was that it should be exercised with a view to do justice to all the parties. The Election Commission might therefore be trusted to pass the appropriate order when there is avoidable and unreasonable delay. That a power might be liable to be abused is no ground for denying it, when the statute confers it, and where there is an abuse of power by statutory bodies, the parties aggrieved are not without ample remedies under the law. With parti-

1 (1954) SCJ 257 (1954) 1 MLJ 480
AIR 1954 SC 210

2 (1917) 34 MLJ 63 LR 45 IA 25
ILR 41 Mad 412 (PC)

cular reference to the order, dated 2nd July, 1952, it is difficult to come to any conclusion other than that in passing that order the discretion under the proviso to section 85 has been properly exercised. The petition had been presented at the post office one day earlier, and reached the Election Commission one day later than the due date. Even if the matter had to be judged under section 5 of the Limitation Act, it would have been a proper exercise of the power under that section to have excused the delay. As was observed in the Full Bench decision in *Krishna v Chathappan*¹ in a passage which has become classic, the words "sufficient cause" should receive "a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant." We have, therefore, no hesitation in holding that the order, dated 2nd July, 1952, is on the facts a proper one to pass under the proviso to section 85.

It was also argued for the appellant that the power conferred by the proviso to section 85 could, on its true construction, be exercised only when the petitioner moved the matter in person, and as the Election Tribunal had found that that was not done, there was no jurisdiction in the Election Commission to pass the order which it did. We do not see anything in the language of the section to support this contention. While the proviso requires that "the person making the petition" should satisfy the Election Commission that there was sufficient cause for delay, it does not require that he should do so in person. And there is nothing in the character of the proceedings requiring that the petitioner should make the representations under that proviso in person. It is only a question of satisfying the Election Commission that there was sufficient ground for excusing the delay, and that could be done otherwise than by the personal appearance of the petitioner. None of the objections advanced against the validity of the order dated 2nd July, 1952, being tenable, the contention that the petition was liable to be dismissed under section 85 as presented out of time must be rejected.

There is another ground on which also the contention of the appellant that the petition is not maintainable should fail. When the election petition came before the Election Tribunal by virtue of the order under section 86 of the Act, the appellant moved for its dismissal under section 90 (4) on the grounds, firstly that it was not presented within the time prescribed by section 81, and secondly, that it was not verified in accordance with section 83, but the Election Tribunal declined to do so. If it was within the competence of the Election Tribunal to pass such an order, that would itself furnish a complete answer to the contention of the appellant that the petition was not maintainable. Mr Krishnaswami Ayyangar sought to get over this difficulty by contending that the order of the Election Commission sending the petition for hearing by the Election Tribunal under section 86 of the Act was without jurisdiction, because an order under that section could be passed only when the petition is not liable to be dismissed under section 85 as when the requirements of section 81, 83 or 117 are complied with, but that when those provisions are not complied with, its only power under that Act was to dismiss it under section 85, that, in consequence, the Election Tribunal acquired no jurisdiction to hear the petition by virtue of that order, and that all the proceedings taken under it culminating in the order now under appeal, were a nullity. This contention is, in our judgment, wholly untenable. The

jurisdiction to pass an order under section 86 arises "if the petition is not dismissed under section 85." That has reference to the factual position whether the petition was, in fact, dismissed under section 85 and not to the legal position whether it was liable to be dismissed. That is the plain meaning of the words of the section, and that is made plainer by section 90 (4) which provides that,

'Notwithstanding anything contained in section 85 the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117'.

This provision clearly contemplates that petitions which are liable to be dismissed for non-compliance with section 81, 83 or 117 might not have been so dismissed, and provides that when such petitions come before the Election Tribunal, it is a matter of discretion with it to dismiss them or not. The power of the Election Tribunal to condone delay in presentation or defective verification is thus unaffected by the consideration whether that petition was liable to be dismissed by the Election Commission under section 85. The effect of an order under section 90 (4) declining to dismiss the petition on the ground of delay or defective verification is clearly to condone those defects.

In the instant case, with reference to the plea of limitation the position stands thus. The delay was condoned by the Election Commission under the proviso to section 85, and by reason of that order, the question is, as already held, no longer open to consideration at any later stage. Even assuming for the sake of argument that the Election Commission had no jurisdiction to pass an order of condonation *suo motu*, and further accepting the finding of the Election Commission that the order, dated 2nd July, 1952, was so made, and that it was therefore a nullity, when the matter came before the Election Tribunal by transfer under section 86, it had jurisdiction to pass appropriate orders under section 90 (4), and its order declining to dismiss the petition is sufficient to condone the defect.

The position as regards verification is slightly different. There is no provision corresponding to the proviso to section 85 conferring express power on the Election Commission to permit amendment of the verification. Whether it has inherent power to permit such amendment, it is not necessary to decide, because when it did not, in fact, dismiss the petition under section 85 for not complying with section 83 and passed an order under section 86 appointing an Election Tribunal for the hearing of the petition, the matter is thereafter governed by section 90 (4) of the Act, and it is a matter of discretion with the Election Tribunal either to dismiss the petition for defective verification or not. In the present case, the Election Tribunal directed the verification to be amended on 24th July, 1952, and further declined to dismiss the petition under section 90 (4) for defective verification. These are not orders with which this Court will interfere in appeal under Article 136 of the Constitution.

The objection to the maintainability of the petition on the ground of delay in presentation and of defective verification must therefore be overruled, and this appeal dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, S R DAS, VIVIAN BOSE,
N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Suraj Mall Mohta and Co

*Petitioner**

A V Visvanatha Sastri and another

Respondents

Taxation of Income (Investigation Commission) Act (XXX of 1947) Section 5 (4)—Has become void after the coming into force of the Constitution of India by reason of Article 14

When India became a Sovereign Republic on 26th January 1950 the validity of all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity on the provisions of Part III of the Constitution.

Sub-section (4) of section 5 of the Taxation of Income (Investigation Commission) Act (XXX of 1947) offends against the guarantee of equal protection of the laws given in Article 14 of the Constitution. Both section 34 of the Indian Income-tax Act and sub-section (4) of section 5 of Act (XXX of 1947) deal with all persons who have similar characteristics and similar properties the common characteristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income. There are substantial differences between the procedures under section 34 of the Income Tax Act and section 5 (4) of Act (XXX of 1947) and the different procedure under the latter operates to the detriment of the persons dealt with. Accordingly sub-section (4) of section 5 and the procedure prescribed by Act (XXX of 1947) in so far as it affects the persons proceeded against under that sub-section being a piece of discriminatory legislation offends against the provisions of Article 14 of the Constitution and is thus void and unenforceable.

The question as to validity of section 5 (1) of Act (XXX of 1947) or whether section 6 (3) of that Act offends against the provisions of Article 20 (3) of the Constitution left open.

Petition under Article 32 of the Constitution of India for the enforcement of fundamental rights.

P R Das and K P Khaitan, Senior Advocates, (B P Maheshwari, Advocate, with them), for Petitioner.

C K Daphtary, Solicitor General for India, ((Paras A Mehta and P G Gokhale, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Mahajan, C J—The principal question canvassed in this case is whether certain sections of the Taxation on Income (Investigation Commission) Act, 1947, i.e., Act XXX of 1947) have become void from the date of the commencement of the Constitution of India by reason of Article 14 of the Constitution.

The petitioner Suraj Mall Mohta & Co, Ltd is a company registered under the Indian Companies Act. Suraj Mall Mohta is also the managing director of another company Messrs Jute and Gunny Brokers, Ltd. A reference had been made by the Central Government under the provisions of section 5 (1) of the Act before 1st September, 1948, of the case of Messrs Jute and Gunny Brokers, Ltd, to the Investigation Commission appointed under Act (XXX of 1947). During the investigation of that case which was numbered 831/30 in the records of the Commission, and during the investigation of some other cases similarly referred to the Commission, it was said to have been discovered that the petitioner company had made secret profits which it had not disclosed and had thus evaded taxation.

On the 28th August, 1953, a report to this effect was made by the Commission to the Central Government under the provisions of section 5 (4) of the Act requesting that the case of the petitioner along with the cases of Suraj Mall Mohta and other members of his family may be referred to the Commission for investigation.

On the 9th September, 1953, the Central Government referred these cases to the Investigation Commission under the provisions of section 5 (4) of the Act and these were numbered 831/64-69 on the records of the Commission. On the 15th of September, 1953, the Commission notified the petitioners that their cases had been referred for investigation and they were called upon to furnish certain material, as detailed in Annexure "B" of the petition, to the Commission.

On the 12th April, 1954, the present petition under Article 32 of the Constitution was filed for the issue of appropriate writs restraining the Commission from taking any action against the petitioner under the provisions of (Act XXX of 1947), on the ground that the provisions of sections 5 (1), 5 (4), 6, 7 and 8 of Act (XXX of 1947) had become void, being discriminatory in character after the coming into force of the Constitution of India.

In order to appreciate the respective contentions raised and canvassed before us on behalf of the petitioner company and the State, it is necessary to set out some of the relevant provisions of the Act. The object of the Act as stated in its Preamble was to ascertain whether the actual incidence of taxation on income in recent years had been in accordance with the provisions of law and whether the procedure for assessment and recovery of tax was adequate to prevent evasion thereof. Section 3 authorizes the Central Government to constitute a Commission, to be called the Income tax Investigation Commission, its duty being (a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof, (b) to investigate in accordance with the provisions of this Act any case or points in a case referred to it under section 5. The composition of the Commission is set out in section 4. Section 5 of the Act reads as follows —

5 (1) The Central Government may at any time before the first day of September, 1948 refer to the Commission for investigation and report any case or points in a case in which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before the first day of September, 1948 apply to the Commission for the withdrawal of any case or points in a case thus referred.

(2)

(3) No reference made by the Central Government under sub-section (1) at any time before the first day of September, 1948, shall be called in question, nor shall the sufficiency of the material on which such a reference has been made be investigated in any manner by any Court.

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1) the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation, it may make a report to the Central Government stating its reasons for such belief and on receipt of such report the Central Government shall notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report."

The powers possessed by the Commission while conducting an investigation are provided for in section 6 which is in these terms

6 (1) The Commission shall have power to require any person or banking or other company to prepare and furnish on or before a specified date written statements of accounts and affairs verified in such manner as may be prescribed by the Commission and if so required by the Commission also duly verified by a qualified auditor giving information on such points or matters as in the opinion of the Commission may directly or indirectly be useful for or relevant to any case referred to it and any person or banking or other company so required shall be bound notwithstanding any law to the contrary to comply with such requirement

(2) The Commission shall also have power to administer oaths and shall have all the powers of a civil court under the Code of Civil Procedure 1908 for the purposes of taking evidence on oath enforcing the attendance of witnesses and of persons whose cases are being investigated compelling the production of documents and issuing commissions for the examination of witnesses

(3) If in the course of any investigation it appears to the Commission to be necessary to examine any accounts or documents or to interrogate any person or obtain any statements from any person the Commission may authorize any income tax authority not below the rank of Income tax Officers in that behalf

(4) The authorized official shall subject to the direction of the Commission have the same powers as the Commission under sub-sections (1) and (2) and any person having charge or custody of accounts or documents required to be examined shall notwithstanding anything in any law to the contrary be bound to produce them

(5) If any person whose case or the points in whose case is or are being investigated by the Commission refuses or fails to attend in person in compliance with a notice in that behalf duly served upon him or to give any evidence or to answer questions or to produce documents or to prepare and furnish statements when called upon to do so the Commission may if satisfied that the refusal or failure was wilful close the investigation of the case and proceed to draw up its report on the case or on the points to the best of its judgment and may in its discretion also direct that such sum as it may specify in the direction shall be recovered from the person by way of penalty for the refusal or failure without prejudice to any penalty under the Indian Income-tax Act 1922

(6)

(7) Where in the opinion of the Commission any person or banking or other company is likely to be in possession of any information or document which may directly or indirectly be useful for or relevant to any case referred to it or any case likely to be reported by the Commission to the Central Government under the provisions of sub-section (4) of section 5 the Commission and subject to the direction of the Commission an authorized official may make enquires in such manner as it or he may deem fit and obtain from such person or banking or other company statements on oath or other wise on such points or matters as may be specified and for the purpose of any such enquiry the Commission and the authorized official shall have all the powers conferred on them by sub-sections (1) (2) (3) and (4)

(8) All materials gathered by the Commission or the authorized official and materials accompanying the reference under sub-section (1) of section 5 may be brought on record at such stage as the Commission may think fit

The procedure to be followed by the Commission is contained in section 7 which provides that subject to the provisions of this Act the Commission shall have power to regulate its own procedure and that the powers of the Commission under sub-sections (1) (2) (3), (7) and (8) of section 6 and sub-sections (2) (4) and (6) of this section i.e. section 7 may be exercised by any member thereof authorised by the Commission in this behalf Sub-section (2) of section 7 provides as follows

7 (2) In making an investigation under clause (b) of section 5 the Commission shall act in accordance with the principles of natural justice shall follow as far as practicable the principles of the Indian Evidence Act 1872 and shall give the person whose case is being investigated a reasonable opportunity of rebutting any evidence adduced against him and the power of the Commission to compel production of documents shall not be subject to the limitation imposed by section 130-

of the Indian Evidence Act 1872 and the Commission shall be deemed to be a court and its proceedings legal proceedings for the purposes of sections 5 and 6 of the Bankers' Books Evidence Act, 1891 "

Sub-section (3) of section 7 is in these terms —

7 (3) Any person whose case is being investigated by the Commission may be represented by a pleader, a registered accountant or an employee duly authorised to act on his behalf provided that no person shall be entitled to be present or to be represented in the course of an enquiry under sub-sections (3) and (7) of section 6

The result of these provisions is that when the Commission is collecting the materials from different sources against the assessee he is not entitled to be present at those stages and take part in the enquiry, but after the material is ready and is placed on the record then he can be present and has to be given a reasonable opportunity of rebutting any evidence that may have been collected against him Sub-section (4) of section 7 which came in for considerable criticism provides as follows —

7 (4) No person shall be entitled to inspect, call for, or obtain copies of, any documents, statement or papers or materials furnished to, obtained by or produced before, the Commission or any authorized official in any proceedings under this Act but the Commission and after the Commission has ceased to exist such authority as the Central Government may in this behalf appoint, may in its discretion allow such inspection and furnish such copies to any person

Provided that for the purpose of enabling the person whose case or points in whose case is or are being investigated to rebut any evidence brought on the record against him, he shall on application made in this behalf and on payment of such fees as may be prescribed by Rules made under this Act be furnished with certified copies of documents statements papers and materials brought on the record by the Commission "

Sub section (5) of section 7 is in these terms

7 (5) Save in cases in which the Commission may exercise its powers under section 19, and Chapter XXXV of the Code of Criminal Procedure, 1898,

(a) no suit, prosecution or other legal proceeding shall be instituted against any person in any civil or criminal court for any evidence given or produced by him in any proceedings before the Commission, and

(b) no evidence so given or produced shall be admissible in evidence against such person in any suit, prosecution or other proceeding before such Court, except with the previous sanction of the Central Government."

The last section that came in for objection is section 8 which is in these terms .

8 (1) Save as otherwise provided in this Act the materials brought on record shall be considered by all the three members of the Commission sitting together and the report of the Commission shall be in accordance with the opinion of the majority

(2) After considering the report, the Central Government shall by order in writing direct that such proceedings as it thinks fit under the Indian Income tax Act, 1922, the Excess Profits Tax Act, 1940 or any other law, shall be taken against the person to whose case the report relates in respect of the income of any period commencing after the 31st day of December, 1938, and upon such a direction being given, such proceedings may be taken and completed under the appropriate law notwithstanding the restrictions contained in section 34 of the Indian Income-tax Act, 1922 or section 15 of the Excess Profits Tax Act, 1940, or any other law and notwithstanding any lapse of time or any decision to a different effect given in the case by any Income tax authority or Income tax Appellate Tribunal

(3)

(4) In all assessment or reassessment proceedings taken in pursuance of a direction under sub-section (2), the findings recorded by the Commission on the case or on the points referred to it shall be subject to the provisions of sub-sections (5) and (6), be final but no proceedings taken in pursuance of such direction shall be a bar to the institution of proceedings under section 34 of the Indian Income tax Act, 1922

(5) In respect of any order made in the course of proceedings taken in pursuance of a direction issued under sub-section (2) the provisions of sections 30, 31, 33 and 33 A of the Indian Income-tax Act, 1922 and the corresponding provisions of the Excess Profits Tax Act, 1940, shall not apply

so far as matters declared final by sub-section (4) are concerned, but the person concerned may, within 60 days of the date upon which he is served with a copy of such order, by application in the prescribed form accompanied by a fee of Rs 100 require the appropriate Commissioner of Income-tax to refer to the High Court any question of law arising out of such order, and thereupon the provisions of sections 66 and 66-A of the Indian Income-tax Act, 1922 shall as far as may be apply with the modification that the reference shall be heard by a Bench of not less than three Judges of the High Court.

(6)

(7) Notwithstanding anything to the contrary contained in this Act or in any other law for the time being in force, any evidence in the case admitted before the Commission or an authorized official shall be admissible in evidence in any proceedings directed to be taken under sub-section (7) "

It was not and could not be denied that the powers vested in the Commission and the procedure prescribed by the impugned Act is more comprehensive and drastic than those contained in the Indian Income tax Act. At the time when the impugned statute was passed there could possibly be taken no exception to its contents on the ground of constitutionality of its provisions, and the powers conferred on the Commission and the procedure it was authorized to follow were well within the ambit of the legislative power of the Central Legislature. The impugned statute admittedly was good law till the coming into force of the Constitution.

When India became a sovereign democratic Republic on 26th January, 1950, the validity of all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity on the provisions of Part III of the Constitution.

The points that require consideration in the case are whether the provisions of section 5 (1), sections 5 (4), 6, 7 and 8 or any parts thereof contravene the guarantee of equal protection of the laws and of the equality before the law, or whether the impugned provisions of the Act are based on a valid classification which is rational in view of the objects of the Act. A further point is whether section 6 (3) of the Act offends against Article 20 (3) of the Constitution.

Mr P. R. Das for the petitioner attacked the provisions of section 5 (1) of the Act on a two-fold ground. (1) That the section was not based on any valid classification, the word "substantial" being vague and uncertain and having no fixed meaning, could furnish no basis for any classification at all, (2) That the Central Government was entitled by the provisions of the section to discriminate between one person and another in the same class and it was authorized to pick and choose the cases of persons who fell within the group of those who had substantially evaded taxation. It would, in these, and the case of one person to the Commission and show favouritism to another person by not sending his case to the Commission though both of these persons be within the group of those who have evaded the payment of tax to a substantial extent.

As regards sub-section (4) of section 5 the learned counsel contended that this section had no independent existence and was bound to fall with sub-section (1) of section 5, if his contention regarding the invalidity of that section prevailed. In the alternative, he contended that assuming that sub-section (1) was valid even then sub-section (4) had to be declared void because it gave arbitrary power to the Commission to pick and choose and secondly because the clause was highly discriminatory in character inasmuch as an evasion, whether substantial or insubstantial, came within its ambit as well as within the ambit of section 34 of the Indian Income-tax Act.

The learned Solicitor General combated all these arguments and contended that the Act was based on a broad and rational classification, that it only dealt with a group of persons who had evaded income-tax *from the beginning of the war, 1st January, 1939, to the period ending with 1st September, 1948*, as a consequence of war controls resulting in black marketing activities and huge profits. In other words, it was said that the Act only dealt with that group of persons who came within the class of war profiteers. This was a class by itself and needed special treatment and therefore the law did not offend against the equal protection of the laws clause of the Constitution. It was suggested that persons coming under sub section (4) of section 5 also belonged to the same class and therefore on the same grounds that section also could not be declared void. It was further said that there was no substantial difference in the procedure prescribed under section 34 of the Indian Income tax Act and the impugned Act and that in any case the procedure prescribed by the Act was a good substitute for that prescribed by the Indian Income tax Act.

In our judgment, it is not necessary in this case to deal with all the contentions raised by Mr P R Das and combated by the learned Solicitor-General. It will be sufficient for the decision of this case to examine the respective contentions raised about the validity of sub section (4) of section 5 of the Act because the case of the petitioner was referred to the Commission under the provisions of this section and was not referred to the Commission by the Central Government under the provisions of section 5 (1) and that being so, an enquiry into the validity of that section is really outside the scope of the present case. On the assumption therefore that section 5 (1) of the Act is based on a valid classification and deals with a group of persons who came within the class of war profiteers which required special treatment and that the classification is rational and that reasonable grounds existed for making distinction between those who fell within that class and others who did not come within it, but without in any way deciding or even expressing any opinion on that question, we proceed to examine the question whether sub section (4) of section 5 under which proceedings had been initiated against the petitioner offends against the guarantee of equal protection of the laws given in Article 14 of the Constitution.

The first question that requires consideration is whether sub section (4) of section 5 deals with the same class of persons as are said to have been grouped together in sub section (1) of section 5, as persons who to a substantial extent evaded payment of taxation on income. In other words, does sub section (4) of section 5 confer on the Commission the power merely to add to the number of persons included in section 5 (1) by the Central Government or does it confer larger power on the Commission. On the phraseology employed in the sub section it is difficult to read therein the limitations contained in sub section (1) of section 5 as contended for by the learned Solicitor-General. Sub section (4) which has been set out above in clear and unambiguous terms provided that where the Commission "has reason to believe that some person *other than the person whose case is being investigated* has evaded payment of taxation on income, it may make a report to the Central Government". It does not repeat the phraseology used in section 5 (1) that some person *other than the person whose case is being investigated* have to a substantial extent evaded payment of taxation on income. On no principle of construction of statutes can the words to a 'substantial extent' be read in sub clause (a) of section 5 (4). On a plain reading of the section it is clear that the sub section is not limited

only to persons who made extraordinary profits and to a substantial extent evaded payment of taxation on income, but applies to all persons who may have evaded payment of taxation on income, irrespective of whether the evaded profits are substantial or insubstantial. In other respects also the phraseology of the section is different from that employed in sub-section (1) of section 5. Sub-section (1) of section 5 provided that where the Central Government 'has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income', while clause (a) of section 5 (4) says that if the Commission 'has reason to believe that some person other than the person whose case is being investigated has evaded payment of taxation on income'. The *prima facie* belief of the Central Government is substituted by the expression "The Commission has reason to believe". The scope of the section is thus different from the scope of section 5 (1) of the Act, both in its extent and range. It is not necessarily limited to profits made within any particular period and brings within its range all persons, whether traders, businessmen, professional people, whoever they may be, who may have at any time evaded payment of taxation on income for whatever cause.

That being the true scope or construction of sub-section (4), it obviously deals with the same class of persons who fall within the ambit of section 34 of the Indian Income-tax Act and are dealt with in sub-section (1) of that section and whose income can be caught by proceeding under that section. Assessees who have failed to disclose fully and truly all material facts necessary for the assessment under section 34 can be equated with persons who are discovered in the course of the investigation conducted under section 5 (1) to have evaded payment of income tax on their incomes. The result is that some of these persons can be dealt with under the provisions of Act XXX of 1947, at the choice of the Commission though they could also be proceeded with under the provisions of section 34 of the Indian Income tax Act. It is not possible to hold that all such persons who evade payment of income-tax and do not truly disclose all particulars or material facts necessary for their assessment and against whom a report is made under sub-section (4) of section 5 of the impugned Act by themselves form a class distinct from those who evade payment of income tax and come within the ambit of section 34 of the Indian Income tax Act. It is well settled that in its application to legal proceedings Article 14 assures to everyone the same rules of evidence and modes of procedure, in other words, the same rule must exist for all in similar circumstances. It is also well settled that this principle does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position. The State can by classification determine who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification means segregation in classes which have a systematic relation, usually found in common properties and characteristics. There is nothing uncommon either in properties or in characteristics between persons who are discovered as evaders of income tax during an investigation conducted under section 5 (1) and those who are discovered by the Income tax Officer to have evaded payment of income-tax. Both these kinds of persons have common properties and have common characteristics and therefore require equal treatment. We thus hold that

both section 34 of the Indian Income tax Act and sub section (4) of section 5 of the impugned Act deal with all persons who have similar characteristics and similar properties, the common characteristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income

The next question that requires determination is whether the procedure prescribed by Act XXX of 1947 for discovering the concealed profits of those who have evaded payment of taxation on their income is substantially different and prejudicial to the assessee than the procedure prescribed in the Indian Income tax Act by section 34. The learned Solicitor General contended that the procedure prescribed by the impugned Act was a fair and good substitute for the procedure prescribed by the Indian Income tax Act and that there was really no substantial difference between the two procedures. He urged that justice could be fully done to those persons by following the new procedure and as a matter of fact, it would be more truly done by following the procedure under the impugned Act than following the procedure under the Indian Income tax Act. This argument, in our opinion, begs the question to be decided in all such cases. It is clear that if persons dealt with by the impugned Act are deprived of the substantial and valuable privileges which they would otherwise have if they were dealt with under the Indian Income tax Act in that situation it is no defence to say that the discriminatory procedure also advances the course of justice. The matter has to be judged from the point of view of the ordinary reasonable man and not from the point of view of the Government. The ordinary reasonable man would say, when the stakes are heavy and serious charge of evasion of income tax are made against him, why one person similarly placed should have the advantage substantially of the procedure prescribed by the Indian Income tax Act, while another person similarly situated be deprived of it. It is from this aspect that the application of Article 14 to the facts of this case has to be considered.

The next question for consideration is whether the procedure prescribed by the impugned Act in regard to persons similarly situated with those who are proceeded with under section 34, is substantially different than under the Act, and operates to the prejudice of those persons. So far as we can see these assessee have been given discriminatory treatment even from those whose cases are referred to under section 5 (1) of the Act to the Commission inasmuch as in the case of persons whose cases are referred to under section 5 (1) of the Act it is the *prima facie* belief of the Government that enables the reference to be made to the Commission and the Commission has after investigation to form an opinion, while in the case of persons coming within the ambit of sub section (4) of section 5 the Commission itself finds and gathers reason to believe that these persons have evaded income tax and on its report the Government is bound to refer their cases to the same Commission who has already arrived at the *prima facie* conclusion that they have evaded payment of income-tax. The investigator and the judge in this situation are rolled into one. That is not so in cases coming under section 5 (1). Apart from this circumstance, there are substantial differences between the two procedures, *inter alia*, in the following matters —

1. Under the provisions of section 8 of the impugned Act, the findings of fact given by the Commission as to factum and extent of the evasion are final and conclusive and thus the persons against whom proceedings are taken under section 5 (4) are deprived of the rights of appeal, second appeal and revision conferred

by sections 31, 32 and 33 of the Indian Income-tax Act on assesseees whose cases are dealt with under the procedure of section 34 of the Indian Income-tax Act. A person who has evaded payment of income-tax and is proceeded with under section 34 and is held to have escaped income tax has a right of appeal to the Appellate Assistant Commissioner of Income-tax and can challenge all the findings of fact given by the Income-tax Officer. If he does not get relief from the Appellate Assistant Commissioner he is entitled to go before the Appellate Tribunal under section 33 and can challenge all the findings of fact given by the Income tax Officer. On the other hand, a person dealt with under section 5 (4) of the impugned Act has no such right. The learned Solicitor-General contended that the constitution of the Commission was such that it was a good substitute for the rights of appeal, second appeal and revision conferred by the Income-tax Act inasmuch as the Commission is comprised of a High Court Judge and two other responsible persons and these sitting together were as good a tribunal as the totality of persons comprising the Income-tax Officer, Appellate Assistant Commissioner and the Appellate Tribunal. In our opinion, the constitution of the Commission by itself cannot be held to be a sufficient safeguard and a good substitute for the rights of appeal and second appeal and revision given by the Indian Income tax Act and there can thus be no doubt that the procedure prescribed by the impugned Act deprives a person who is dealt with under that Act of these valuable rights of appeal, second appeal and revision to challenge questions of fact decided by the judge of first instance. There is thus a material and substantial difference between the two procedures, one prescribed by the impugned Act and the other prescribed by the Indian Income-tax Act.

2 When an assessment on escaped or evaded income is made under the provisions of section 34 of the Indian Income-tax Act all the provisions for arriving at the assessment provided under section 23 (3) come into operation and the assessment has to be made on all relevant materials and on evidence and the assessee ordinarily has the fullest right to inspect the record and all documents and materials that are to be used against him. Under the provisions of section 37 of the Indian Income-tax Act the proceedings before the Income tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal. This right has not been taken away by any express provisions of the Income-tax Act but the impugned Act contains a mandate in sub section (4) of section 7 to the effect that 'no person shall be entitled to inspect, call for, or obtain copies of, any documents, statement or papers or materials furnished to, obtained by or produced before the Commission or any authorized official in any proceedings under this Act'. There is a proviso to sub section (4) which says that for the purpose of enabling the person whose case or points in whose case is or are being investigated to rebut any evidence brought on the record against him, he shall, on application made in this behalf and on payment of such fees as may be prescribed by rules be furnished with certified copies of documents, statements, papers and materials brought on the record by the Commission. This little mercy shown to the person whose case is being investigated by the Commission is no substitute for the fullest right of inspection which under ordinary law and the Code of Civil Procedure and in a judicial proceeding a person would have in order to meet the

case made against him. He is entitled only to get copies of that portion of the materials which is brought on the record and which is going to be used against him and it is clear that portions of the material which are in his favour and which have not been brought on the record may not be available to him at all. He is not even entitled to see all the books of account which may have been impounded under the Act and taken possession of by the Commission. It may well happen that there are entries in those books which contain the rebuttal evidence, but the assessee is not entitled to have their copies. The assessee is not even entitled to see his own books which are in the possession of the Commission and take copies of those entries which are favourable to him and which would completely demolish the case made against the assessee by the Commission. The procedure thus prescribed in this matter by the impugned Act is substantially prejudicial to the assessee than the procedure prescribed under the Indian Income tax Act. It was not disputed by the learned Solicitor General that the procedure prescribed by the impugned Act in sections 6 and 7 was more drastic than the procedure prescribed in sections 37 and 38 of the Indian Income tax Act. Again, so far as the procedure for reference under sub-section (4) of section 5 is concerned, it is also to a certain extent prejudicial to the assessee. There is no doubt that there is in this matter in the first stages some similarity in the procedure to be followed for catching evaded income both under section 34 of the Indian Income tax Act and under the provisions of sub-section (4) of section 5 of the impugned Act, but the overall picture is that though under the Indian Income tax Act the same officer who first arrives at a tentative conclusion bears and decides the case, his decision is not final but is subject to appeal, while under the provisions of sub-section (4) of section 5 the decision of the Commission tentatively arrived at in the absence of the assessee becomes final when taken in his presence and that makes all the difference between the two procedures. If there was a provision for reviewing the conclusions of the Investigation Commission when acting both as investigators and judges, there might not have been such substantial discrimination in the two procedures as would bring the case within Article 14, but as pointed out above, there is no provision of that kind in the impugned Act.

It may also be pointed out that under the provisions of section 34 investigation into escaped income or evaded income is limited to a maximum period of eight years while under the provisions of sub-section (4) of section 5 it is not limited to any period and this certainly operates to the detriment of those dealt with under sub-section (4) of section 5 of the impugned Act and those dealt with under section 34 of the Indian Income tax Act.

For the reasons given above we are of the opinion that sub-section (4) of section 5 and the procedure prescribed by the impugned Act in so far as it affects the persons proceeded against under that sub-section being a piece of discriminatory legislation offends against the provisions of Article 14 of the Constitution and is thus void and unenforceable. In reaching this decision we refrain from expressing any opinion, as above pointed out, on the validity of section 5 (1) of the Act or on the question whether section 6 (5) of the impugned Act offends against the provisions of Article 20 sub-clause (3) of the Constitution. We accordingly direct that an appropriate writ be issued against the Investigation Commission prohibiting it from taking any proceedings under the provisions of the impugned Act against the petitioner. The petitioner will have his costs of these proceedings.

Petition allowed

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction]

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, S. R. DAS, GHULAM HASAN, N H BHAGWATI AND B. JAGANNADHADAS, JJ.

The State of Madras

*Appellant**

C G Menon and Another
Union of India

Respondents
Intervener

Fugitive Offenders Act (1881) (44 and 45 Vic Ch 69), Sections 12 and 14—Enforceability in India after the independence of India

After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order-in Council amongst those possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India having committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament has not so far enacted any law on the subject and no arrangement has been arrived at between the two Governments. The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone. The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines, it is difficult to hold that section 12 or section 14 of the Fugitive Offenders Act (1881) has force in India by reason of the provisions of Article 372 of the Constitution. The whole basis of the applicability of Part II of the Fugitive Offenders Act has gone, India is no longer a British Possession and no Order-in-Council can be made to group it with other British Possessions. Those of the countries which still form part of British Possessions and which along with British India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding Article 272 of our Constitution India was no longer a British Possession and therefore the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India.

(1953) 2 M L J 61, affirmed

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 20th February, 1953 of the High Court of Judicature at Madras† in Criminal Revision Case No 1034 of 1953 (Criminal Reference No 51 of 1953)

C K Daphtary, Solicitor-General for India, V K T Chari, Advocate-General for Madras (*Perus A. Mehta and P G Gokhale, Advocates, with them*), for Appellant.

M K Nambiyar, Senior Advocate (*S Subramanian, Advocate, with him*), for Respondents

C K Daphtary, Solicitor-General for India (*Perus A Mehta and P G Gokhale, Advocates, with him*, for Intervener

The Judgment of the Court was delivered by

Mahajan, C J—This is an appeal on a certificate under Article 132 (1) of the Constitution against the judgment of the High Court of Judicature at

* Cri Appeal No 33 of 1953

19th May, 1954.

† (1953) 2 M L J 61 AIR 1953 Mad 729

Madras dated the 20th February, 1953, holding that section 14 of the Fugitive Offenders Act, 1881, is void as it offends against the provisions of the Constitution being discriminatory in its effect

The respondents, husband and wife, were apprehended and produced before the Chief Presidency Magistrate, Egmore, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. Mr Menon is a barrister at law, and was practising as an advocate and solicitor in the Colony of Singapore. Mrs Menon is an advocate of the Madras High Court and was until recently a member of the Legislative Council of the Colony of Singapore. Both of them came to India some time after July, 1952. On the 22nd August, 1952, the Government of Madras forwarded to the Chief Presidency Magistrate, Madras, copies of communications that passed between the Government of India and the Colonial Secretary of Singapore requesting the assistance of the Government of India to arrest and return to the Colony of Singapore the Menons under warrants issued by the Third Police Magistrate of Singapore. Mr Menon was charged on several counts of having committed criminal breach of trust and Mrs Menon was charged with the abetment of these offences.

The Menons when produced before the Presidency Magistrate, questioned the validity of their arrest. They pleaded their innocence and contended that being citizens of India, they could not be surrendered as the warrants related to matters of a civil nature and had been given the colour of criminal offences merely for the purpose of harassing them out of political animosity and with a view to prejudice the Court against them and were issued in bad faith. It was further urged that the provisions of the Fugitive Offenders Act under which action was sought to be taken against them were repugnant to the Constitution of India and were void and unenforceable.

The Presidency Magistrate expressed the view that by retaining the Indian Extradition Act, 1903, and with it Chapter IV, the President of India may have intended to give effect to the Fugitive Offenders Act, 1881, but by the omission to adapt or modify it suitably it had become impossible to give effect to that intention, the provisions of the Act as they are, being inconsistent with and repugnant to the sovereign status of the Indian Republic. In view, however, of the provisions of section 432, Criminal Procedure Code, as amended by Act XXIV of 1951, he referred to the decision of the High Court the following questions of law —

(1) Whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950 when India became a Sovereign Democratic Republic, and

(2) Whether even if it applied it or any of its provisions particularly Part II thereof, is repugnant to the Constitution of India and is therefore void and or inoperative.

The High Court held that section 14 of the Fugitive Offenders Act was inconsistent with the fundamental right of equal protection of the laws guaranteed by Article 14 of the Constitution and was void to that extent and unenforceable against the petitioner. The second question referred having thus been answered in favour of the respondents, it was not thought necessary to return any answer to the first question. As above stated, a certificate under Article 132 (1) of the Constitution for leave to appeal to the Supreme Court against this decision was granted to the State of Madras. The Union of India was allowed to intervene at their request.

The learned Solicitor General who argued the case on behalf of the Intervener as well as on behalf of the State of Madras conceded that the Fugitive Offenders Act, 1881, was not adapted by any specific order of the President and that the Parliament in India had not enacted any legislation on its lines. He however, contended that the omission to adapt the impugned Act in no way affected the question whether it was in force as the law in the territory of India after the commencement of the Constitution. Reliance was placed on Article 372 (1) of the Constitution which is in these terms:

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

And it was said that the impugned Act was the law in force in the territory of India immediately before the commencement of the Constitution and continued in force under the provisions of this Article after its commencement. It was also said that the adaptations made in the Indian Extradition Act 1903 by implication kept alive the Fugitive Offenders Act 1881, and its different provisions.

In order to decide whether Part II of the Fugitive Offenders Act 1881, comprising sections 12 and 14 under the provisions of which the Menons are under arrest, have force after the coming into force of the Constitution it is necessary to appreciate the relevant provisions of the Act. The Fugitive Offenders Act 1881, as enacted by the British Parliament is sub divided into four parts and is comprised of forty-one sections. Part I of the Act concerns itself with offences mentioned in section 9. Section 5 of this Part provided that a fugitive when apprehended 'shall be brought before a magistrate who shall hear the case in the same manner and have the same jurisdiction and powers as near as may be as if the fugitive was charged with an offence committed within his jurisdiction and that if the endorsed warrant for the apprehension of the fugitive is duly authenticated and such evidence is produced as according to the law ordinarily administered by the magistrate raises a *strong or probable presumption* that the fugitive committed the offence mentioned in the warrant and that the offence is one to which this part of this Act applies the magistrate shall commit the fugitive to prison to await his return and shall forthwith send a certificate of the committal and such report of the case as he may think fit if in the United Kingdom to a Secretary of State, and if in a British possession to the Governor of that possession. Section 12 which is the first section in Part II of the Act is in these terms:

This part of this Act shall apply only to those *groups of British possessions* to which by reason of their contiguity or otherwise it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by *Order in Council* to direct that this part of this Act shall apply to the *group of British possessions mentioned in the Order* and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions exceptions and qualifications as may be deemed expedient.

Section 14 which is directly in point so far as the respondents are concerned provides as follows:

The magistrate before whom a person so apprehended is brought if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant may order such prisoner to be returned to the British possession in which the warrant was issued and for that purpose to be delivered into the custody of the person to whom

the warrant is addressed, or any or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof."

A comparison between the provisions of Part I and Part II of the Act makes it clear that with regard to offences relating to which Part I has application a fugitive when apprehended could not be committed to prison and surrendered unless the magistrate was satisfied that on the evidence produced before him there was a strong or probable case against him, while in regard to a fugitive governed by Part II of the Act it was not necessary to arrive at such a finding before surrendering him. There is thus a substantial and material difference in the procedure of surrendering fugitive offenders prescribed by the two Parts of the Act.

The scheme of the Fugitive Offenders Act is that it classifies fugitive offenders in different categories and then prescribes a procedure for dealing with each class. Regarding persons committing offences in the United Kingdom and British Dominions and foreign countries in which the Crown exercises foreign jurisdiction, the procedure prescribed by Part I of the Act has to be followed before surrendering them and unless a *prima facie* case is established against them they cannot be extradited. Extradition with foreign States is, except in exceptional cases, governed by treaties or arrangements made *inter se*. Extradition of offenders between the United Kingdom and the Native States in India is governed by the Indian Extradition Act. Under the provisions of that Act no person apprehended could be surrendered unless a *prima facie* case was made out against him. Extraditions *inter se* between British possessions, however, were dealt with differently by the Act. They were grouped together according to their contiguity, etc., by an Order-in-Council and treated as one territory and this grouping was subject to alterations and modifications by an Order in Council and conditions of extradition could also be prescribed by such an Order.

An Order-in-Council, dated the 2nd January, 1918, grouped together the following British possessions and Protected States with British India for the purposes of Part II of the Act—Ceylon, Hongkong, the Straits Settlements, the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Trengannu, Brunei, North Borneo and Sarawak. The Order is in these terms:

"Whereas by an order of Her Majesty Queen Victoria in Council bearing date the 12th day of December, 1895, it was ordered that Part II of the Fugitive Offenders Act, 1881, should apply to the group of *British Possessions therein mentioned*, that is to say, Her Majesty's East Indian Territories Ceylon and the Straits Settlements,

And Whereas by the Straits Settlements and Protected States Fugitive Offenders Order in Council, 1916 as amended by the Straits Settlements and Protected States Fugitive Offenders Order in Council, 1917, it is ordered that the Fugitive Offenders Act, 1881, shall apply as if the Protected States named in the schedule to the first mentioned order were British Possessions,

And Whereas by reason of *their contiguity or the frequent inter-communication between them* it seems expedient to His Majesty and conducive to the better administration of justice therein to apply Part II of the Fugitive Offenders Act, 1881, to the abovenamed *British Possessions and Protected States* and such application has been requested by the Rulers of the said States,

Now therefore, His Majesty, by virtue of the powers in this behalf by the Fugitive Offenders Act, 1881 and 1915 and otherwise in His Majesty vested is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows—

On and after the first day of February, 1918, the heretofore recited Order in Council of the 12th day of December, 1895 shall be revoked, without prejudice to anything lawfully done thereunder or to any proceedings commenced before the said date, and Part II of the Fugitive Offenders

Act, 1881, shall apply to the *group of British Possessions and Protected States hereunder mentioned*, that is to say, British India, Ceylon, Hongkong, Straits Settlements, the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Trengganu, Brunei, North Borneo and Sarawak.'

By another Order in Council, dated the 29th July, 1937, Burma which ceased to be part of British India was also included in the group of British Possessions and Protected States mentioned in the earlier Order in Council

It is plain from the above provisions of the Act as well as from the Order in Council that British Possessions which were contiguous to one another and between whom there was frequent inter-communication were treated for purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a *prima facie* case was made against him was dispensed with. Under the Indian Extradition Act, 1903, also a similar requirement is insisted upon before a person can be extradited.

The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British Possessions could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament has not so far enacted any law on the subject and it was not suggested that any arrangement has been arrived at between these two Governments. The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone. The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines, it seems difficult to hold that section 12 or section 14 of the Fugitive Offenders Act has force in India by reason of the provisions of Article 372 of the Constitution. The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone, India is no longer a British Possession and no Order in Council can be made to group it with other British Possessions. Those of the countries which still form part of British Possessions and which along with British India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding Article 272 of our Constitution India was no longer a British Possession and therefore the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India. Indeed some of the other members of this group have also achieved independence. Under section 12 of the Act it is not possible for His Majesty from time to time by Order in Council to alter the character of this group or its composition or to take any action as prescribed by that section. Article 372 of the Constitution cannot save this law because the grouping is repugnant

to the conception of a sovereign democratic republic. The political background and shape of things when Part II of the Fugitive Offenders Act, 1881, was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions. That being so, in our opinion, the tentative view expressed by the Presidency Magistrate was right and though the High Court did not return the answer to the first question referred to it, in our judgment, the case can be shortly disposed of on that ground.

The contention of the learned Solicitor-General that by reason of the adaptations made in the Indian Extradition Act, 1903, and references made therein to the Fugitive Offenders Act, it should be held that the whole of the Fugitive Offenders Act including Part II had been adapted by the President does not seem to be well founded. The scheme of the Indian Extradition Act which was founded on the English Act is quite different. It does not specifically keep alive any of the provisions of Part II of the Fugitive Offenders Act, 1881, and there is no adaptation of the Fugitive Offenders Act, 1881, within the four corners of the Indian Extradition Act, 1903. In these circumstances it is not possible to work out the sections of the Fugitive Offenders Act and apply them to the situation that has arisen after the coming into force of the Constitution of India. Moreover clause 28 of the Adaptation of Laws Order, 1950, can have no application to such a case. We do not think that it is necessary in the present case to enter into a discussion of the question whether British Possessions with which India was grouped under Part II of the Fugitive Offenders Act, 1881, should now be treated as foreign States qua India and that offenders apprehended can be surrendered under the Indian Extradition Act or any other law, provided a *prima facie* case is made against them as the proceedings taken against the respondents were specifically taken under section 14 of the Fugitive Offenders Act, 1881, and it is not the practice of this Court to decide questions which are not properly raised before it or which do not arise directly for decision.

For the reasons given above we uphold the decision of the High Court, though on a ground different from that on which that Court decided, in favour of the respondents. The appeal therefore fails and is dismissed.

Agent for appellant R H Dhebar

Appeal dismissed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —*MERRICK CHANDRA MOHAPATRA*, Chief Justice, S K DAS, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Seth Jagjivan Mavji Vithalani, residing at Kalbadevi Road,
Bombay

*Appellant**

v
Messrs Ranchhodas Meghji

Respondent

Negotiable Instruments Act (XXVI of 1881), sect on 32—Drawee of hundi not liable on it to payee, unless he has accepted; — Acceptance cannot be wrung from plea of discharge by payee

The drawee of a hundi is not liable on it to the payee, unless he has accepted it. Unless there is acceptance no action on the bill is maintainable by the payee against the drawee. There cannot be a part from mercantile usage any oral acceptance of a hundi much less an acceptance by

conduct, where at least no question of estoppel arises. Where the payee claims that the person who presented the hundi and received the payment had no authority and that the payment was not binding on him, an acceptance of the hundi by the drawee by implication arising from the discharge of the instrument is not sufficient to fix a liability on the drawee under section 32 of the Negotiable Instruments Act, as there was no valid presentment for acceptance.

Appeal by Special Leave granted by the Supreme Court of India by its Order, dated the 22nd May, 1954, from the Judgment and Decree, dated the 9th September, 1952, of the High Court of Judicature at Bombay in Appeal No. 811 of 1951 from Original Decree arising from the Judgment and Decree, dated the 24th July, 1951, of the Bombay City Civil Court at Bombay in Suit No. 2310 of 1950.

C. K. Daphtry, Solicitor General for India (*J. B. Dadachany* and *Rajinder Narain*, Advocates, with him), for Appellant.

S. C. Isaacs, Senior Advocate (*S. S. Shukla*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The suit out of which this appeal arises, was instituted by the appellant on a hundi for Rs. 10,000, dated 4th December, 1947, drawn in his favour by Haji Jethabhai Gokul and Co., of Basra on the respondents, who are merchants and commission agents in Bombay. The hundi was sent by registered post to the appellant in Bombay, and was actually received by one Parikh Vrajlal Narandas, who presented it to the respondents on 10th December, 1947, and received payment therefor. It may be mentioned that the appellant had been doing business in forward contracts through Vrajlal as his commission agent, and was actually residing at his Pedha. On 12th January, 1948, the appellant sent a notice to the respondents repudiating the authority of Vrajlal to act for him and demanding the return of the hundi, to which they sent a reply on 10th February, 1948, denying their liability and stating that Vrajlal was the agent of the appellant, and that the amount was paid to him *bona fide* on his representation that he was authorised to receive the payment.

On 9th December, 1950, the appellant instituted the present suit in the Court of the City Civil Judge, Bombay. In the plaint he merely alleged that the payment to Vrajlal was not binding on him, and that "the defendant-drawee" remained liable on the hundi. The defendants, apart from relying on the authority of Vrajlal to grant discharge, also pleaded that the plaint did not disclose a cause of action against them, as there was no averment therein that the hundi had been accepted by them.

At the trial, the appellant gave evidence that Vrajlal had received the registered cover containing the hundi in his absence, and collected the amount due thereunder without his knowledge or authority. The learned City Civil Judge accepted this evidence, and held that Vrajlal had not been authorised to receive the amount of the hundi. He also held that the plea of discharge put forward by the respondents implied that the hundi had been accepted by them. In the result, he decreed the suit.

The defendants took up the matter in appeal to the High Court of Bombay, and that was heard by Chagla, C. J. and Shah, J., who held that the appellant would have a right of action on the hundi against the respondents only if it had been accepted by them, and that as the plaint did not allege that it had been accepted by them, there was no cause of action against them. They accordingly allowed

the appeal, and dismissed the suit. The plaintiff prefers this appeal on special leave granted under Article 136 of the Constitution.

There has been no serious attempt before us to challenge the correctness of the legal position on which the judgment of the High Court is based, that the drawee of a negotiable instrument is not liable on it to the payee, unless he has accepted it. On the provisions of the Negotiable Instruments Act, no other conclusion is possible. Chapter III of that Act defines the obligations of parties to negotiable instruments. Section 32 provides that

"In the absence of a contract to the contrary the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand."

Under this section, the liability of the drawee arises only when he accepts the bill. There is no provision in the Act that the drawee is as such liable on the instrument, the only exception being under section 31 in the case of a drawee of a cheque having sufficient funds of the customer in his hands, and even then, the liability is only towards the drawer and not the payee. This is elementary law, and was laid down by West, J., in *Seth Khandas Narandas v. Dahiabhai*¹, in the following terms.

"Where there is no acceptance, no cause of action can have arisen to the payee against the drawee."

Nor is there any substance in the contention that section 61 of the Act provides for presentment for acceptance only when the bill is payable after sight, and not when it is payable on demand, as is the suit hundi. In a bill payable after sight, there are two distinct stages, firstly when it is presented for acceptance, and later when it is presented for payment. Section 61 deals with the former, and section 64, with the latter. As observed in *Ram Raju Jambhekar v. Pralhadas Subkaran*², "presentment for acceptance must always and in every case precede presentment for payment." But when the bill is payable on demand, both the stages synchronise, and there is only one presentment, which is both for acceptance and for payment. When the bill is paid, it involves an acceptance, but when it is not paid, it is really dishonoured for non-acceptance. But whether the bill is payable after sight or at sight or on demand, acceptance by the drawee is necessary before he can be fixed with liability on it. It is acceptance that establishes privity on the instrument between the payee and the drawee, and we agree with the learned Judges of the High Court that unless there is such acceptance, no action on the bill is maintainable by the payee against the drawee.

The main contention on behalf of the appellant was that such acceptance must be implied when the respondents received the bill and made payment therefor. The argument was that the very act of the payment of the hundi to Vrajlal was an acknowledgment that the defendants were liable on the hundi to whosoever might be the lawful holder thereof. The answer to this contention is, firstly, that there was no valid presentment of the hundi for acceptance, and secondly, that there was no acceptance of the same as required by law.

On the question of the presentment of the hundi for acceptance, the position stands thus. The person who presented it to the defendants was Vrajlal, and if he had no authority to act in the matter, it is difficult to see how he could be held to have acted on behalf of the plaintiff in presenting the hundi. There was only

one single act, and that was the presentment of the hundi by Vrajlal and the receipt of the amount due thereunder. If he had no authority to receive the payment, he had no authority to present the bill for acceptance. It was argued that there was no provision in the Act requiring that bills payable at sight should be presented for acceptance by the holder or on his behalf, as there was, for bills payable after sight, in section 61. But, as already pointed out, in the case of a bill payable at sight, both the stages for presentment for acceptance and for payment are rolled up into one, and, therefore, the person who is entitled to receive the payment under section 78 of the Act is the person, who is entitled to present it for acceptance. Under section 78, the payment must be to the holder of the instrument, and if Vrajlal had no authority to receive the amount on behalf of the plaintiff, there was no valid presentment of the hundi by him for acceptance either.

It has next to be considered whether, assuming that there was a proper presentment of the hundi for acceptance, there was a valid acceptance thereof. The argument of the appellant was that as the hundi had got into the hands of the defendants and was produced by them the very fact of its possession would be sufficient to constitute acceptance. Under the common law of England even a verbal acceptance was valid. *Vide* the observations of Baron Parke in *Bank of England v Archer*¹. It was accordingly held that such acceptance could be implied when there was undue retention of the bill by the drawee (*Vide* Note to *Harvey v Martin*²). But the law was altered in England by section 17 (2) of the Bills of Exchange Act, 1882, which enacted that an acceptance was invalid unless it was written on the bill and signed by the drawee. Section 7 of the Negotiable Instruments Act following the English law, provides that the drawee becomes an acceptor, when he has signed his assent upon the bill. In view of these provisions, there cannot be, apart from any mercantile usage, an oral acceptance of the hundi, much less an acceptance by conduct, where at least no question of estoppel arises.

But then it was argued that the possession of the hundi was not the only circumstance from which acceptance could be inferred, that there was the plea of the defendants that they had discharged the hundi, and that that clearly imported an acknowledgment of liability on the bill, and was sufficient to clothe the plaintiff with a right of action thereon. Assuming that the plea of the discharge of a hundi implies an acknowledgment of liability thereunder—an assumption which we find it difficult to accept, the question still remains whether that is sufficient in law to fasten a liability on the defendants on the hundi. What is requisite for fixing the drawees with liability under section 32 is the acceptance by them of the instrument and not an acknowledgment of liability. As the law prescribes no particular form for acceptance, there should be no difficulty in construing an acknowledgment as an acceptance, but then, it must satisfy the requirements of section 7 and must appear on the bill and be signed by the drawees. In the present case, the acknowledgment is neither in writing, nor is it signed by the defendants. It is a matter of implication arising from the discharge of the instrument. That is not sufficient to fix a liability on the defendants under section 32. In conclusion, we must

¹ (1843) 11 M. & W. 383 at pp. 389, 390.
15 E.R. 822, 825.

² (1808) 1 Camp. 425, 170 E.R. 1009.

hold that there was neither a valid presentment of the hundi for acceptance, nor a valid acceptance thereof

In the result, the appeal fails, and is dismissed with costs

Appeal dismissed

SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT —B K MUKHERJEA, S R DAS, VIVIAN BOSE, GHULAM HASAN
AND B JAGANNADHADAS JJ

Mr 'G', a Senior Advocate of the Supreme Court

*Petitioner**

v

The Hon'ble Chief Justice and Judges of the High Court of
Judicature at Bombay

Respondents

Bar Councils Act (XXXI III of 1926) sections 10 and 11—Order of appointment of tribunal—If can be oral—H gh Court If can refer a matter to the tribunal suo motu

Though it is necessary that there should be some record of the order appointing the tribunal of the Bar Council the order itself need not be a written one it can be an oral order given to a proper officer of the H gh Court by the Chief Justice

The H gh Court can refer a matter as to the professional conduct of a member of the Bar of its own motion under section 10 (2) of the Bar Councils Act and the H gh Court's jurisdiction to refer is not affected by the absence of a complaint to the H gh Court

Petition under Article 32 of the Constitution for the enforcement of fundamental rights

The Petitioner in person

M C Setalvad, Attorney General for India (G N Joshi and P G Gokhale, Advocates, with him), for Respondents

The Judgment of the Court was delivered by

Bose, J.—This is a petition under Article 32 of the Constitution and raises the same question on the merits as in the connected summons case in which we have just delivered judgment. The facts will be found there. In the present matter it is enough to say that no question arises about the breach of a fundamental right. But as a matter touching the jurisdiction of the Bar Council Tribunal and that of the Bombay High Court was argued we will deal with it shortly.

Mr G's first objection is that the proceedings before the Tribunal were *ultra vires* because there was no proper order of appointment. At a very early stage he applied to the Registrar and also to the Prothonotary for a copy of the order of the Chief Justice constituting the Tribunal. He was told by the Prothonotary that the order was oral.

Mr G put in two written statements before the Tribunal and did not challenge this statement of fact in either. He contented himself with saying that the order was "not judicial" and so was not valid. He took up the same attitude in the High Court. The learned Judges said—

The record clearly shows that when it came to the notice of this Court it was decided to refer this case to the Bar Council under section 10 (2) and accordingly a Tribunal was appointed under section 11 (1) by the learned Chief Justice of this Court.*

In his petition to this Court he did not challenge this statement of fact but again confined his attack to the question of the validity of the order. It is evident from all this that the fact that an oral order was made was not challenged. We cannot allow Mr 'G' to go behind that.

The next question is whether an oral order is enough. The Bar Councils Act does not lay down any procedure. All it says is—

Section 10 (2)

the High Court may of its own motion so refer any case in which it has otherwise reason to believe that any such advocate has been so guilty and section 11 (2) says—

The Tribunal shall consist of not less than three members of the Bar Council appointed for the purpose of the inquiry by the Chief Justice

We agree it is necessary that there should be some record of the order on the files but, in our opinion, the order itself need not be a written one, it can be an oral order given to a proper officer of the Court. In the present case, the letter No G-1003 dated 29th April, 1953 of the Prothonotary to the Registrar and the letter No E 41-09/53 dated the 1st May 1953 of the Registrar to the Bar Council (office copies of which were retained on the files) are a sufficient record of the making of the order. Mr 'G' was supplied with copies of these letters and so was aware of the fact that orders had been issued. As a matter of fact, we have seen the originals of the High Court's office files and find that the names of the three members of the Tribunal are in the Chief Justice's handwriting with his initials underneath. That is an additional record of the making of the order. We hold that an order recorded in the manner set out above is sufficient for the purposes of sections 10 (2) and 11 (2) of the Bar Councils Act and hold that the Tribunal was validly appointed.

Mr G's next point is that there was no complaint to the High Court and so it had no jurisdiction to refer the matter to the Tribunal. This ignores the fact that the High Court can refer a matter of this kind of its own motion under section 10 (2) of the Bar Councils Act.

We have dealt with the merits in the connected case.

This petition is dismissed but, here again, we make no order about costs.

Petition dismissed

SUPREME COURT OF INDIA

[Original (Disciplinary) Jurisdiction]

PRESENT —B K. MUKHERJEA, S R DAS, VIVIAN BOSE, GHULAM HASAN AND B JAGANNADHARAS, JJ

In the matter of Mr 'G' a Senior Advocate of the Supreme Court *

Supreme Court Rules Order 4 rule 30—Legal Practitioner entering into agreement with client to receive 50 per cent of any fees he might make in the legal proceedings in respect of which he was engaged—If guilty of professional misconduct

An Advocate is expected at all times to comport himself in a manner befitting his status as an officer and a gentleman. He is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted and if he departs from the high standards which that profession has set for itself and demands of him in professional matters he is liable to disciplinary action.

* 27th May, 1954.

The rigid English rules of champerty and maintenance do not apply in India and an agreement to receive a share of the recoveries in a legal proceeding would have been enforceable and good, if it had been between ordinary parties. There is nothing morally wrong nothing to shock the conscience nothing against public policy and public morals in such a transaction *per se*, that is to say when a legal practitioner is not concerned. It may be even enforceable when entered into by a legal practitioner but it is professional misconduct on his part.

The conduct of the Advocate (concerned in the instant case) in entering into an agreement to receive 50 per cent. of the recoveries he might make in the legal proceedings in respect of which he was engaged amounts to professional misconduct and as it was committed in the face of the Bombay view expressed by Sir Lawrence Jenkins in 1901 (in 3 Bom. L.R. 102) disciplinary action is called for.

The Bar Councils Act makes no modification in the disciplinary jurisdiction of the High Court or of the sense in which professional misconduct had been understood throughout India upto that time.

In the matter of Summons issued to Mr 'G' under Rule 30 of Order 4, Supreme Court Rules, to show cause to this Court why disciplinary action should not be taken against him.

"G" in person

M C Setalvad, Attorney-General for India (G A Joshi and P G Gokhale, Advocates, with him) for the Hon'ble Chief Justice and other Hon'ble Judges of the Bombay High Court.

The Judgment of the Court was delivered by

Bose, J—This matter arises out of a summons issued to Mr G, a Senior Advocate of this Court, under Order IV, rule 30, of the Supreme Court Rules, to show cause why disciplinary action should not be taken against him.

Mr G was called to the Bar in England and was later enrolled as an Advocate of the Bombay High Court. He is also an Advocate of this Court. On 20th December, 1952, he entered into an agreement with a client whereby the client undertook to pay him 50 per cent. of any recoveries he might make in the legal proceedings in respect of which he was engaged. On this being reported to the High Court the matter was referred to the Bombay Bar Council and was investigated by three of its members under section 11 (1) of the Bar Councils Act. They recorded their opinion that this amounted to professional misconduct. The High Court agreed and suspended Mr G from practice as an Advocate of the Bombay High Court for six months. The learned Judges considered that they had no power to affect his position as an Advocate of this Court, so directed that a copy of their judgment be submitted to this Court to enable this Court to take such action on it as it thought fit. Acting on this report this Court issued notice to the petitioner under Order 4, rule 30, to show cause why disciplinary action should not be taken against him. About the same time Mr G filed a petition for a writ under Article 32 of the Constitution. We are confining ourselves in this order to the matter raised in the summons.

There is no dispute about the facts. They are set out in Mr G's petition under Article 32 and are as follows.

On the 23rd of July, 1951 Mr G's client is said to have entered into an agreement with the Baroda Theatres Ltd, for work on a picture which they intended to produce. The remuneration agreed on was Rs 15,000. Of this Rs 3,000 was paid at once and the balance, Rs 12,000 was to be paid on the completion of the picture. It is said that at the date of the dispute the Baroda Theatres admitted

that Rs 9,400 was due, but as they did not pay up, the client consulted Mr. G about the best way to recover his money and wanted to know what the expenses and fees would be. After examining the matter in detail and talking it over with his client, Mr. G advised him that two courses were open to him.

First, there was a civil suit. He said the cost of this would be about Rs 800 for court-fees and expenses and about Rs 1,250 for fees. The other alternative was winding up proceedings. The client was told that in these the court fees would be lower but Mr. G's fees would have to be higher as winding up proceedings are usually protracted.

The client preferred the latter course but said that he could not pay more than Rs 200 towards the expenses and as regards the fees he said he was too poor to pay and so made a proposal which he reduced to writing. It is embodied in the following letter dated 20th December, 1952, addressed to Mr. G.

"I hereby engage you with regard to my claim against the Baroda Theatres Ltd. for a sum of Rs 9,400 (balance due to me).

Out of the recoveries you may take 50 per cent. of the amount recovered. I will by Wednesday deposit Rs 200 in your account or give personally towards expenses.

Mr. G said that he was unwilling to work on these terms but when he was pressed to do so and when he realised that unless he agreed the client would probably lose a just claim he reluctantly agreed.

Rs 200 was thereupon paid towards expenses and Mr. G at once entered into correspondence with the solicitors of the Baroda Theatres Ltd. A winding up petition was drawn up and declared but was not filed because the matter was compromised at that stage. The Baroda Theatres Ltd. undertook to pay Mr. G's client Rs 6,400 in full satisfaction of his claim.

The client then paid Mr. G a further Rs 800 (He had already paid Rs 200, part of which was spent for expenses). Mr. G claimed the balance which was roughly Rs 2,200.

We are not concerned with the proceedings in the Bombay High Court and before the Tribunal of the Bar Council in the summons matter with which we are dealing at the moment, as we are acting here under Order 4, rule 30, of the Rules of this Court. The only question is whether, on the facts and circumstances set out above (all of which are admitted by Mr. G), his engagement of 20th December, 1952, amounts to professional misconduct.

Mr. G argued the matter at length, and to his credit be it said objectively and with restraint, but it is not necessary to cover the wide field he did because we are not concerned with ordinary rights of contract, nor with ordinary legal rights, but with the special and rigid rules of professional conduct expected of and applied to a specially privileged class of persons who, because of their privileged status, are subject to certain disabilities which do not attach to other men and which do not attach even to them in a non professional character. To use the language of the Army, an Advocate of this Court is expected at all times to comport himself in a manner befitting his status as an "officer and a gentleman". In the Army it is a military offence to do otherwise (see section 45 of the Army Act, 1950) though no notice would be taken of ungentlemanly conduct under the ordinary law of the land, and none in the case of a civilian. So here, he is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he

has so long been admitted, and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action

Now it can be accepted at once that a contract of this kind would be legally unobjectionable if no lawyer was involved. The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good. It may even be that it is good in law and enforceable as it stands though we do not so decide because the question does not arise but that was argued and for the sake of argument even that can be conceded. It follows that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction *per se*, that is to say, when a legal practitioner is not concerned. But that is not the question we have to consider. However much these agreements may be open to other men what we have to decide is whether they are permissible under the rigid rules of conduct enjoined by the members of a very close professional preserve so that their integrity, dignity and honour may be placed above the breath of scandal. That is part of the price one pays for the privilege of belonging to a kind of close and exclusive "club" and enjoying in it privileges and immunities denied to less fortunate persons who are outside its fold. There is no need to enter its portals and there is no need to stay, but having entered and having elected to stay and enjoy its amenities and privileges, its rules must be obeyed or the disciplinary measures which it is entitled to take must be suffered. The real question therefore is whether this kind of conduct is forbidden to the select or whether, if it was once forbidden, the ban has since been removed, either directly or by implication, by legislative action.

Now it was not disputed that, so far as English Barristers are concerned, this sort of agreement was once taboo both in England and in India. Even when they worked in the mofussil in India and did the kind of work that would be done by solicitors in England and in the Presidency Towns in India, they could not enter into an engagement of this kind, for even solicitors in England are forbidden from making such bargains (see Cordery's Law Relating to Solicitors, fourth edition, page 342). But, it was argued, this rule only applied to members of the English Bar, and in any event it was abrogated in India in 1926.

We will first examine whether there was a difference between Barristers and other classes of lawyers. This point was raised in the Punjab in 1907 but was rejected by a majority of seven Judges to two in a Full Bench of nine Judges in *Ganga Ram v. Devi Das*¹. But it is to be observed that even the two dissenting Judges agreed that an engagement of the present kind was not open to a member of the Punjab Bar. Lal Chand, J., (who dissented) said at page 331:

I am in perfect accord with the Hon'ble Chief Judge that stipulation to receive a share in the result of the litigation is different from a stipulation to be paid a fee contingent on success.

The other dissenting Judge, Chatterji, J., agreed with him but even as regards the practice which these two learned Judges thought permissible at the date of their decision, Chatterji, J. said at page 299:

"It must not be supposed, however, that I am in favour of the practice. I should on the whole prefer its abolition."

We agree with Chitty, J, at page 326 that there was no justification even at that date for seeking to apply one set of rules to one branch of the profession and another to another. As he said—

"What is right or wrong for the one must be right or wrong for the other" or, as Sir Lawrence Jenkins, C J, put it in *In re N F Bhandara*¹

"For common honesty there must be no sliding scale even in the mofussil"

Reading "standards of professional conduct" for the word "honesty", the quotation is apt here. In any case, the decisions to which we shall refer deal with "Advocates" and even where these "Advocates" were Barristers the matter touched them as "Advocates" of an Indian High Court and not because of their special status as Barristers. It is true that at one time Advocates were mainly Barristers, but that was not always the case and the rules laid down in these decisions governed all "Advocates", whether Barristers or otherwise.

The learned Judges in the Punjab Record case collected all the available authorities up to the year of their decision and they show that this kind of agreement was condemned in Calcutta in 1874 and 1900. In the matter of *Moung Htoon Oung*² and in the matter of *an Advocate of the Calcutta High Court*³, in Bombay in 1901. In *re N F Bhandara*⁴, and in Madras in 1881 and again in 1939. *Achamparambath Chenna Kunhammu v William Sydenham Gantz*⁵ and in *re an Advocate of the Madras High Court*⁶. As the Bombay High Court is the one in which Mr G normally practices and as the engagement was entered into in Bombay, we think it proper to quote the following passage at page 113 from the judgment in the Bombay case (*In re N F Bhandara*⁴)

"I consider that for an Advocate of this Court to stipulate for, or receive, a remuneration proportioned to the results of litigation or a claim whether in the form of a share in the subject matter a percentage, or otherwise, is highly reprehensible, and I think it should be clearly understood that whether his practice be here or in the mofussil he will by so acting offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of this Court."

Mr G argued that even if this was once the law, section 3 of the Legal Practitioners (Fees) Act, 1926 (Act XXI of 1926) changed it and that now every legal practitioner is competent to settle the terms of his engagement and his fees by private agreement with his client. Thus, Mr G said, entitles him to enter into any agreement which the law permits in the case of ordinary persons. Legal practitioners, according to him, are now governed by the law of contract and not by rules imported from other countries with different ideas and different social customs and imposed on the Bar in India mainly by English Judges. He do not agree, because this Act is not concerned with professional misconduct. That is dealt with by the Bar Councils Act which was passed in the same year (1926). The Bar Councils Act makes no modification in the disciplinary jurisdiction of the High Court or of the sense in which professional misconduct had been understood throughout India up to that time.

The only Indian decision which Mr G could quote in his favour was *Muthoo Lall v Budree Pershad*⁷. But that was not a case in which disciplinary action was being taken against a legal practitioner for professional misconduct. The question

1 (1901) 3 Bom L.R. 107 at p. 111 (F.B.)

2 (1874) 21 W.R. 207

3 (1900) 4 Cal.L.J. 259

4 (1901) 3 Bom L.R. 102 at p. 113 (F.B.)

5 (1881) I.L.R. 3 Mad. 138 (F.B.)

6 (1939) I.L.R. (1940) Mad. 17 (1939) 2

M.L.J. 30 (F.B.)

7 1 W.P.H.C.R. 1

there was whether an agreement which might be objectionable on the ground of professional misconduct could be enforced by suit. Two Bombay decisions on which Mr G relies are to be distinguished in the same way *Shivram Hari v Arjun*¹ and *Parshram Vaman v Hiranman Fatu*². Whether these cases were rightly decided or whether they would also be hit on the ground of public policy as Chutty, J., thought of a similar matter in the Punjab Record case, is something which does not arise for decision here. It is enough to say that those cases are distinguishable on the ground that the Judges there were not considering a case of disciplinary action.

Mr G relied on the practice in some of the American States where an agreement by an attorney to purchase part of the subject matter of the litigation is upheld. The class of cases to which he refers are summarised in a footnote to *Mc Micken v Perin*³. He relied on this to show that contracts of this kind cannot be dismissed as reprehensible or morally wrong. We do not propose to enter into this because what may be harmless in one country may not be so in another. We will however pause to observe that Rattigan, J., collected a large volume of American authority at pages 318-321 of his opinion in *Ganga Ram v Devi Das*⁴ to show that even in those States where this is permitted it is regretted and frowned upon. For historical reasons obtaining there, the practice may have come to stay however much it is regretted but in 1937 the American Bar Association adopted the following canon of Professional Ethics:

The lawyer should not purchase any interest in the subject matter of the litigation on which he is conducting

In India history tells the converse tale. We see no reason why we should import what many feel is a mistake, even in the country of its origin, from another country and seek to perpetuate their error here when a sound and healthy tradition to the contrary already exists in our Bar. The reasons for exacting these high standards in this country, where ignorance and illiteracy are the rule, are even more important than they are in England where the general level of education is so much higher. We hold that the conduct of Mr G amounts to professional misconduct and as it was committed in the face of the Bombay view expressed by Sir Lawrence Jenkins in 1901 disciplinary action is called for.

Now had Mr G been as restrained and objective in his petition under Article 32 as he was while arguing the case before us, we might have considered a warning enough seeing that this is the first time this question has been considered in this Court, but, in view of his personal attacks on the learned Chief Justice in his petition where he has questioned his good faith and attributed malice to him, we are not able to deal with him as lightly. We therefore direct that he be suspended from practicing in this Court for a period which will expire on the same date as his period of suspension in the Bombay High Court.

There will be no order about costs.

Respondent directed to be suspended

1 (1891) I L R 5 Bom 258

2 (1894) I L R 8 Bom 413

3 15 Law Edn 504 and 505

4 (1906) 61 P R (of 1907) 280 (F B)

SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Harishankar Bagla and another

*Appellants**

v

The State of Madhya Pradesh

Respondent

Essential Supplies (Temporary Powers) Act (XXIV of 1946)—And Cotton Textiles (Control of Movement) Order (1948)—Constitutional validity—Control Order if in conflict with Railways Act (IX of 1890), sections 27, 28 and 41

Clause 3 of the Cotton Textiles (Control of Movement) Order (1948) does not deprive a citizen of the right to dispose of or transport cotton textiles purchased by him. It requires him to take a permit from the Textile Commissioner to enable him to transport them. The requirement of a permit in this regard cannot be regarded as an unreasonable restriction on the citizens' right under sub-clauses (f) and (g) of Article 19 (1) of the Constitution of India. The Essential Supplies (Temporary Powers) Act (XXIV of 1946) was an emergency measure and the requirement of a permit to transport essential commodities by road or rail or other means of transport cannot in any sense of the term be said in a temporary Act to be unreasonable restriction on the citizens' rights mentioned in clauses (f) and (g) of Article 19 (1). The policy underlying the Control Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called in valid and if there is an abuse of the power there is ample power in the courts to undo the mischief. Further there are directions and rules laid down by the Central Government for the grant or refusal of permits.

Duaria Prasad v. The State of Uttar Pradesh AIR 1951 SC 224 1954 SCJ 238 (SC) distinguished.

The Preamble and the body of the sections of the Essential Supplies (Temporary Powers) Act sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy. Section 3 of the Act cannot be said to amount to delegation of legislative power outside the permissible limits.

Section 4 of the Act enumerates the classes of persons to whom the power could be delegated or sub-delegated by the Central Government and it is not correct to say that the instrumentalities have not been selected by the Legislature itself. Section 4 cannot be said to be invalid.

The Railways Act does not exclude the placing of a disability on a railway administration by the Government or any other authority. The requirement of a permit by clauses (3) (4) and (5) of the Cotton Textiles (Movement Control) Order merely supplements and is not in conflict with the provisions of the Railways Act. The requirement of a permit does not in any way override or supercede the provisions of sections 27, 28 and 41 of the Railways Act.

Section 6 of the Essential Supplies Act does not either expressly or by implication repeal any of the provisions of pre-existing laws neither does it abrogate them. Even if it does it is within the powers and there is no delegation involved in the provisions of section 6 at all and that section could not be held to be unconstitutional on that ground.

Accordingly the provisions of sections 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act 1946 are constitutional and the Cotton Textiles (Control of Movement) Order 1948 is also constitutional.

Appeal by Special Leave granted by the Order of this Court, dated the 16th January, 1953 from the Judgment and Order of the High Court of Judicature at Nagpur, dated the 15th September, 1952 in Criminal Case No. 45 of 1951 from

the Order of the Court of the Magistrate 1st Class Hoshangabad in Criminal Case No 75 of 1949'

H J Umrigar, Rameshwarnath and Rajender Narain, Advocates for Appellants

T L Shevde, Advocate-General of Madhya Pradesh, (*T P Nank and I N. Shroff*, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

Mahajan, C J—The facts giving rise to this appeal are these. The appellant Harishankar Bagla and his wife Smt Gomti Bagla were arrested at Itarsi by the Railway Police on the 29th of November, 1948, for contravention of section 7 of the Essential Supplies (Temporary Powers) Act, 1946, read with clause (3) of the Cotton Textiles (Control of Movement) Order, 1948, having been found in possession of "new cotton cloth" weighing over six maunds which cloth, it was alleged, was being taken by them from Bombay to Kanpur without any permit. After various vicissitudes through which the chalan passed the case was eventually withdrawn by the High Court to itself on the 3rd of September, 1951, as it involved a decision of constitutional issues. By its order, dated the 15th September, 1952, the High Court upheld the provisions of sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946, as constitutional. It also upheld the constitutionality of the impugned Order. Section 6 of the Act was held to be inconsistent with the provisions of the Railway Act but it was held that its unconstitutionality did not affect the prosecution in this case. The High Court directed that the prosecution should proceed and the records sent back to the trial Court for being dealt with in accordance with law. Leave to appeal was given both to the appellants and the respondent and requisite certificates under Articles 132 and 134 of the Constitution were granted. This appeal along with the connected appeal No 6 of 1953 is before us on the basis of the said certificates.

Mr Umrigar, who appeared in this and the connected appeal, urged the following points for our consideration and decision.

(1) That sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946 and the provisions of the Cotton Cloth Control Order contravened the Fundamental right of the appellants guaranteed by Article 19 (1) (f) and (g) of the Constitution,

(2) That section 3 of the Essential Supplies (Temporary Powers) Act, 1946 and in particular section 4 were *ultra vires* the Legislature on the ground of excessive delegation of legislative power,

(3) That section 6 having been found *ultra vires*, section 3 was inextricably connected with it and that both the sections should have been declared *ultra vires* on that ground, and

(4) That the impugned Control Order contravened existing laws, viz, the provisions of sections 27, 28 and 41 of the Indian Railways Act, and was thus void in its entirety.

The respondent challenged the judgment of the High Court that section 6 of the Act was unconstitutional.

In our judgment, none of the points raised by Mr Umrigar have any validity. On the other hand, we are of the opinion that the High Court was in error in declaring section 6 of the Act unconstitutional.

Sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946, provide as follows —

"3 (1) The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein

(2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide—

(a) for regulating by licences permits or otherwise the production or manufacture of any essential commodity,

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity,

4. The Central Government may by notified order direct that the power to make orders under section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government as may be specified in the direction"

Section 6 runs thus

6 Any order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act

Under powers conferred by section 3 the Central Government promulgated on 10th September 1948, Cotton Textiles (Control of Movement) Order, 1948. Section 2 of this Order defines the expressions "apparel", "carrier", "hostels", "cloth" and "textile commissioner". Section 3 of the Order runs as follows —

3 No person shall transport or cause to be transported by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under and in accordance with—

(i) a general permit notified in the *Gazette of India* by the Textile Commissioner or

(ii) a special transport permit issued by the Textile Commissioner

Section 8 provides that the Textile Commissioner may, by notification in the *Gazette of India*, prescribe the manner in which any application for a special transport permit under this Order shall be made. The Central Government has prescribed forms for application for obtaining permits and the conditions under which permits can be obtained.

The first question canvassed by Mr Umrigar was that the provisions of section 3 of the Control Order infringed the rights of a citizen guaranteed in sub-clauses (f) and (g) of Article 19 (1) of the Constitution. These sub-clauses recognise the right of a citizen to dispose of property, and to carry on trade or business. The requirement of a permit to transport by rail cotton textiles to a certain extent operates as a restriction on the rights of a person who is engaged in the business of purchase and sale of cotton textiles. Clause (5) of Article 19 however permits such restrictions to be placed provided they are in the public interest. During the period of emergency it was necessary to impose control on the production, supply and distribution of commodities essential to the life of the community. It was for this reason that the Legislature passed the Essential Supplies (Temporary Powers) Act authorising the Central Government to make orders from time to time controlling the production, supply and distribution of essential commodities. Clause 3 of the Control Order does not deprive a citizen of the right to dispose of or transport cotton textile purchased by him. It requires him to take a permit

from the Textile Commissioner to enable him to transport them. The requirement of a permit in this regard cannot be regarded as an unreasonable restriction on the citizen's right under sub clauses (f) and (g) of Article 19 (1). If transport of essential commodities by rail or other means of conveyance was left uncontrolled it might well have seriously hampered the supply of these commodities to the public. Act XXIV of 1946 was an emergency measure and as stated in its preamble, was intended to provide for the continuance during a limited period of powers to control the production, supply and distribution of, and trade and commerce in, certain commodities. The number of commodities held essential are mentioned in section 2 of the Act and the requirement of a permit to transport such commodities by road or rail or other means of transport cannot, in any sense of the term, be said, in a temporary Act, to be unreasonable restriction on the citizens' rights mentioned in clauses (f) and (g) of Article 19 (1). The High Court was therefore right in negating the contention raised regarding the invalidity of the Control Order as abridging the rights of the citizen under Article 19 (1) of the Constitution.

Mr Umrigar further argued that the Textile Commissioner had been given unregulated and arbitrary discretion to refuse or to grant a permit, and that on grounds similar to those on which in *Dwarka Prasad v The State of Uttar Pradesh*¹, this Court declared void section 4 (3) of the U P Coal Control Order, section 3 of the Control Order in question should also be declared void. This argument again is not tenable. In the first place, the appellants never applied for a permit and made no efforts to obtain one. If the permit had been applied for and refused arbitrarily they might then have had a right to attack the law on the ground that it vested arbitrary and unregulated power in the Textile Commissioner. The appellants were not hurt in any way by any act of the Textile Commissioner as they never applied for a permit. They were transporting essential goods by rail without a permit and the only way they can get any relief is by attacking the section which obliges them to take a permit before they can transport by rail essential commodities. It may also be pointed out that reference to the decision of this Court in *Dwarka Prasad's case*¹, is not very apposite and has no bearing on the present case. Section 4 (3) of the U P Coal Control Order was declared void on the ground that it committed to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chose and there was nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same. Section 4 (3) of the U P Coal Control Order was in these terms:

The Licensing Authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke or modify any licence or any terms thereof granted by him under the Order for reasons to be recorded. Provided that every power which is under this Order exercisable by the Licensing Authority shall also be exercisable by the State Coal Controller, or any person authorized by him in this behalf.

In the present Control Order there is no such provision as existed in the U P Coal Control Order. Provisions of that Control Order bear no analogy to the provisions of the present Control Order. The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and

the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the Courts to undo the mischief. Presumably, as appears from the different forms published in the Manual, there are directions and rules laid down by the Central Government for the grant or refusal of permits.

The next contention of Mr Umrigar that section 3 of the Essential Supplies (Temporary Powers) Act, 1946, amounts to delegation of legislative power outside the permissible limits is again without any merit. It was settled by the majority judgment in the *Delhi Laws Act case*¹, that essential powers of legislation cannot be delegated. In other words, the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. In the present case the Legislature has laid down such a principle and that principle is the maintenance or increase in supply of essential commodities and of securing equitable distribution and availability at fair prices. The principle is clear and offers sufficient guidance to the Central Government in exercising its powers under section 3. Delegation of the kind mentioned in section 3 was upheld before the Constitution in a number of decisions of their Lordships of the Privy Council, vide *Russell v The Queen*², *Hodge v The Queen*³, and *Shannon v Louer Mainland Dairy Products Board*⁴ and since the coming into force of the Constitution delegation of this character has been upheld in a number of decisions of this Court on principles enunciated by the majority in the *Delhi Laws Act case*¹. As already pointed out, the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the frame work of that policy. Mr Umrigar could not very seriously press the question of the invalidity of section 3 of the Act and it is unnecessary therefore to consider this question in greater detail.

Section 4 of the Act was attacked on the ground that it empowers the Central Government to delegate its own power to make orders under section 3 to any officer or authority subordinate to it or the Provincial Government or to any officer or authority subordinate to the Provincial Government as specified in the direction given by the Central Government. In other words, the delegate has been authorized to further delegate its powers in respect of the exercise of the powers of section 3. Mr Umrigar contended that it was for the Legislature itself to specify the particular authorities or officers who could exercise power under section 3 and it was not open to the Legislature to empower the Central Government to say what officer or authority could exercise the power. Reference in this connection was made

¹ (1951) S.C.R. 747 (1951) S.C.J. 527

(2) L.R. (1882) 7 A.C. 89

(3) L.R. (1883) 9 A.C. 117

⁴ L.R. (1938) A.C. 708

⁵ 293 U.S. 383

to two decisions of the Supreme Court of the United States of America—*Panama Refining Co v Ryan*¹ and *Schechter v United States*². In both these cases it was held that so long as the policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts, to which the policy as declared by the legislature is to apply. These decisions in our judgment do not help the contention of Mr Umrigar as we think that section 4 enumerates the classes of persons to whom the power could be delegated or sub delegated by the Central Government and it is not correct to say that the instrumentalities have not been selected by the Legislature itself. The decision of their Lordships of the Privy Council in *Shannon's case*³ completely negatives the contention raised regarding the invalidity of section 4. In that case the Lt-Governor in Council was given power to vest in a marketing board the powers conferred by section 4 A (d) of the Natural Products Marketing (British Columbia) Act, 1936. The attack on the Act was that without constitutional authority it delegated legislative power to the Lt-Governor in Council. This contention was answered by their Lordships in these terms:

The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lt-Governor in Council or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures Provincial, Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act.

The next contention that the provisions of the Textile Control Order operate as an implied repeal of sections 27, 28 and 41 of the Indian Railways Act and are therefore invalid is also not well founded. The requirement of a permit by clause (3) and provisions of clause (4) of the Order which empower the Textile Commissioner to direct a carrier to close the booking or transport of cloth, apparel, etc., are not in direct conflict with sections 27, 28 and 41 of the Railways Act. The Railways Act does not exclude the placing of a disability on a railway administration by the Government or any other authority. This clause merely supplements the relevant provisions of the Railways Act and does not supersede them. Similar observations apply to clause (5) which enables the Textile Commissioner to place an embargo on the transport of certain textiles from one area to another. There is nothing in the provisions of the Order which in any way overrides or supersedes the provisions of the different sections of the Railways Act referred to above.

The last contention of Mr Umrigar that section 6 having been declared invalid, section 3 is inextricably mixed with it and should also have been declared invalid is also not valid, because apart from the grounds given by the High Court for holding that the two sections were not so interconnected that the invalidity of one would make the other invalid, the High Court was in error in holding that section 6 was unconstitutional. Section 6 of the Act cited above declares that an order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any in-

1 293 U.S. 383

2 295 U.S. 493

3 L.R. 1938 A.C. 708

strument having effect by virtue of any enactment other than this Act. In other words it declares that if there is any repugnancy in an order made under section 3 with the provisions of any other enactment, then notwithstanding that inconsistency the provisions of the Order will prevail in preference to the provisions of other laws which are thus inconsistent with the provisions of the Order. In the view of the High Court the power to do something which may have the effect of repealing, by implication, an existing law could not be delegated in view of the majority decision of this Court in *Re Delhi Laws Act*¹, where it was held that to repeal or abrogate an existing law is the exercise of an essential legislative power. The learned Judges of the High Court thought that the conferment of power of the widest amplitude to make an order inconsistent with the pre-existing laws is nothing short of a power to repeal. In our opinion the construction placed on section 6 by the High Court is not right. Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws, neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. The repeal of a statute means as if the repealed statute was never on the statute book. It is wiped out from the statute book. The effect of section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946 or the orders made thereunder. In other words, the orders made under section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the Order made under section 3 it does not operate in that field for the time being. The ambit of its operation is thus limited without there being any repeal of any one of its provisions. Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under section 3 and the provisions of an existing law, to the extent of the repugnancy, the existing law stands repealed by implication, it seems to us that the repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting section 6 Parliament itself has declared that an order made under section 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the legislature itself has declared its will that way in section 6. The abrogation or the implied repeal is by the force of the legislative declaration contained in section 6 and is not by force of the order made by the delegate under section 3. The power of the delegate is only to make an order under section 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act. Parliament being supreme, it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the act of

the Parliament itself. There is no delegation involved in the provisions of section 6 at all and that section could not be held to be unconstitutional on that ground.

The result therefore is that in our opinion the provisions of sections 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act, 1946 are constitutional and the impugned Order is also constitutional. Accordingly this appeal is dismissed, and the trial Court is directed to proceed expeditiously with the case in accordance with law.

Appeal dismissed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B K. MUKHERJEA, VIVIAN BOSE, N. H. BHAGWATI AND T. L. VENKATARAMA AYYAR, JJ

K. N. Guruswamy

*Appellant**

The State of Mysore and others

Respondents

Mysore Excise Act (1901) and Rules thereunder—Sale of liquor licences by Government—Necessity to conform to the Rules

Liquor licensing in the State of Mysore can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rule. Whenever there is a departure from the methods of auction and tender provided for in the Rules the departure must be sanctioned by Government and must be notified. The matter cannot be left to the arbitrary discretion of some lesser authority.

The highest bidder at the auction obtained no right to the licence by the mere fact that the contract had been knocked down in his favour (the acceptance being subject to sanction). Where before sanction a private offer of a higher amount is received the higher offer cannot be accepted without following the procedure prescribed and in the secrecy of the office. Whatever is done must be done either under the Rules or under a Notification which would receive like publicity and have like force and of which the people at large would have like notice. Arbitrary improvisation of an *ad hoc* procedure to meet exigencies of a particular case is ruled out. A grant of the contract straightaway to a rival who makes a surer higher offer to the sanctioning authority after the contract had been knocked down is therefore wrong.

[However as the period of contract was to expire shortly a writ would be ineffective and it is not the practice to issue meaningless writs.]

Appeal under Article 133 (1) of the Constitution of India against the Judgment and Order dated the 10th July, 1953 of the Mysore High Court in Civil Petition No. 116 of 1953.

M. C. Setalvad, Attorney General for India, (Umrigar and Rajinder Narain, Advocates with him) for Appellant.

Nittoor Srinivasa Rao, Advocate-General of Mysore, (R. Ganapathy Iyer, Advocate with him) for Respondents 1 to 3.

M. S. K. Aiyangar, Advocate, for Respondent No. 4.

The Judgment of the Court was delivered by

Bose, J. —We are concerned in this appeal with the sale of a liquor contract for the year 1953-54 in the State of Mysore.

The appellant Guruswamy and the fourth respondent Thummappa are rival liquor contractors. The contract for the City and Taluk of Bangalore was auctioned by the third respondent, the Deputy Commissioner on 27th April, 1953. The

appellant's bid of Rs 1,80,000 a month was the highest, so the contract was knocked down in his favour subject to formal confirmation by the Deputy Commissioner. On the same day the appellant deposited Rs 1,99,618-12-0

The fourth respondent Thummappa was present at the auction but did not bid. Instead of that he went direct to the Excise Commissioner behind the appellant's back and made an offer of Rs 1,85,000

On 11th May, 1953, the Excise Commissioner passed the following order —

"The highest bid received in the recent auction sale is Rs 1,80,000 per mensem. As Sri Thummappa has now offered Rs 1,85,000 per mensem, the sale held by the Deputy Commissioner is cancelled. The Deputy Commissioner Bangalore District, is requested to take further action under the Rule 10 of the Rules regulating the sales of Excise Privileges

The tender given by Thummappa is herein enclosed"

The same day the Deputy Commissioner informed the appellant that the sale had been cancelled by the Excise Commissioner and on 16th May, 1953 he was given a copy of the Excise Commissioner's order

On 12th May, 1953, the Deputy Commissioner made the following order

"The Toddy sale held on the 27th April 1953, in which a bid of Rs 1,80,000 per month was secured. This sale has been cancelled by the Excise Commissioner in view of the fact that a higher tender of Rs 1,85,000 per month has been received from Sri T. Thummappa

2 In these circumstances, the tender of Sri T. Thummappa accepted

15

Protests and appeals were made to various authorities but they proved infructuous, so, on 19th June, 1953, the appellant applied to the State High Court at Mysore for a writ of *mandamus*. The petition was dismissed but the appellant was granted a certificate under Article 133 (1) of the Constitution and so has come here

The matter is governed by the Mysore Excise Act of 1901 and the Rules made under it. Section 15 of the Act prohibits the sale of liquor without a licence from the Deputy Commissioner. Section 16 provides that—

"It shall be lawful for the Government to grant to any person or persons on such conditions and for such period as may seem fit the exclusive or other privilege—

(2) of selling by retail

any country liquor within any local area

No grantee or any privilege under this section shall exercise the same until he has received a licence in this behalf from the Deputy Commissioner

Section 29 authorises Government to make rules for the purpose of carrying out the provisions of the Act

The notification containing the Rules is headed—

the Government of His Highness the Maharaja of Mysore are pleased to frame the following rules to regulate the disposal of the privilege of retail vend of intoxicating liquors

Then comes Rule I. It runs—

The privilege of retail vend of excisable articles shall be disposed of either by auction or by such other method as may be notified by Government

Rule I 2 is also relevant. It says—

"In cases where the right of retail vend is permitted by Government to be disposed of by calling for tenders, a notification calling for the same shall be published by the Excise Commissioner in

three successive issues of the Mysore Gazette after obtaining the previous approval of the Government therefor

Then follow a series of rules about auctions. Out of them, Rule II 8 is all we need note. It runs—

The shops will be knocked down to the highest bidder but the sale will be subject to formal confirmation by the Deputy Commissioner who shall be at liberty to accept or reject any bid at his discretion. Such formal confirmation will be tantamount to an acceptance of the bid unless revised by the Excise Commissioner for special reasons.

Finally, we come to Rule II 10. It is as follows

Shops remaining unsold at the first auction or shops the sales of which have not been confirmed but cancelled will ordinarily be disposed of by re-auction or by tender or otherwise at the discretion of the Deputy Commissioner later on.

This Court had occasion to observe in *State of Assam v Keshab Prasad Singh and others*—a fisheries case—that the sale of these licences forms such a lucrative source of revenue that State legislatures have deemed it wise not to leave the matter to unfettered executive discretion, accordingly legislation has been enacted in most parts of India to regulate and control the licensing of these trades, Acts are passed and elaborate Rules are drawn up under them. It is evident that there is a policy and a purpose behind it all and it is equally evident that the fetters imposed by legislation cannot be brushed aside at the pleasure of either Government or its officers. The Rules bind State and subject alike.

The Act and the Rules make it plain that liquor licensing in the State of Mysore can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rule.

Rule I 1 gives two options: the licences must either be sold by auction or “by such other method as may be notified by Government.” It is not by such other method as may be desired by Government or thought fit by it but by such other method as may be notified. The notification is of the essence, and for good reason these are matters of public concern and of importance to the State because of the revenue reaped. It is necessary therefore that all and sundry should know what is what by public notification in the Gazette and it is important that this should not be left to arbitrary executive pleasure.

Rule I 2 indicates one of the many shapes the “otherwise” can take: one of the “otherwise” methods can be by calling for tenders. But if that is selected, then a further fetter is forged. There must be a public call for the tenders by publication in no less than three successive issues of the Mysore Gazette, and more, the approval of the Government must first be obtained. The careful elaboration of this Rule precludes us from holding that it can be by-passed or ignored at the will and pleasure of an executive officer.

But the authorities are not tied down to the method of auction and tender, that may be undesirable for a variety of reasons: the urgency of the situation being one of them, nor are they bound to follow Rule I 2 as an alternative. They have a discretion under Rule I 1 and can act “otherwise.” But if they wish to do that, then it is essential that due notice and publicity be given of the “otherwise” method in a Government notification as Rule I 1 directs. The Gazette is issued every week and where necessary a special edition of the Gazette can be

issued at a day's notice, so the urgency of the matter is no real reason for by-passing the Rules. What the legislature has insisted on is that whenever there is a departure from the methods of auction and tender provided for in the Rules, the departure must be sanctioned by Government and must be "notified". The matter cannot be left to the arbitrary discretion of some lesser authority.

In the present case, there has not been any notification in the Gazette to bring the "otherwise" portion of Rule I 1 into play, nor have tenders been called for in the only way which Rule I 2 permits. We are therefore left with the normal mode of sale contemplated by the Rules, namely public auction.

It is admitted that the contract was auctioned on 27th April, 1953, it is admitted that the appellant bid up to Rs. 1,80,000 and it is admitted that that was the highest bid, it is also admitted that the contract was knocked down in his favour. But that was not final because under Rule II 8 the sale was expressly subject to the formal confirmation of the Deputy Commissioner who is given a discretion to accept or reject a bid. The Deputy Commissioner did not give his sanction but equally he did not exercise his discretion. But that can be treated as an irregularity in this case because even if sanction had been given it was subject to revision by the Excise Commissioner "for special reasons". That fact distinguishes this case from *Commissioner of Police, Bombay v. Gordhandas Bhanji*.¹

Now the Excise Commissioner exercised his authority a little irregularly it is true because the matter did not reach him through the proper channel, but that would not call for interference by way of a writ. The substance of the thing is there and as the High Court was not a Court of appeal it could not have been called upon to correct a mere technical error in the exercise of a jurisdiction which was otherwise valid. It must be remembered that the Excise Commissioner was not a Court of law whose jurisdiction was dependent upon the filing of a regular appeal. The sale was cancelled and a reason was given, and the fact that Government would be able to get an extra Rs. 5000 a month as revenue is certainly a good reason. The cancellation was therefore proper and as the appellant obtained no right to the licence by the mere fact that the contract had been knocked down in his favour (the acceptance being subject to sanction) the appellant's first relief asking for a *mandamus* to confirm his right to the licence for 1953-54 cannot be granted.

We now pass on to the subsequent action of the Deputy Commissioner in giving the contract to Thummappa. It was contended that the Deputy Commissioner acted within the ambit of his powers because Rule II 10 gives him an absolute discretion either to re-auction or act otherwise and no fetters are placed upon the "otherwise". It was argued that the Rules which precede Rule II 10 deal with the initial stages: they require either an auction or the calling for tenders by notification under Rule I 2, or such other method as may have been duly notified but once there is an auction and it is cancelled under Rule II 8, then the authorities are no longer bound by any rules and have an absolute and unfettered discretion. The urgency of the situation at that stage is advanced as a reason.

We are unable to agree. The same word appearing in the same section of the same set of Rules must be given the same meaning unless there is anything to indicate the contrary. The full content of the "otherwise" is specified in Rule

I 1 It must be construed in the same sense in Rule II 10 But that apart, this would, in our opinion, run counter to the policy of the legislature which is that matters of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office Whatever is done must be done either under the Rules or under a Notification which would receive like publicity and have like force, and of which the people at large would have like notice Arbitrary improvisation of an *ad hoc* procedure to meet the exigencies of a particular case is ruled out The grant of the contract to Thummappa was therefore wrong

The next question is whether the appellant can complain of this by way of a writ In our opinion, he could have done so in an ordinary case The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else Here we have Thummappa, who was present at the auction and who did not bid—not that it would make any difference if he had, for the fact remains that he made no attempt to outbid the appellant If he had done so it is evident that the appellant would have raised his own bid The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to compete is unjustified Apart from all else, that in itself would in this case have resulted in a loss to the State because as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher But deeper considerations are also at stake, namely the elimination of favouritism and nepotism and corruption not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid All that is part and parcel of the policy of the legislature None of it can be ignored We would therefore in the ordinary course have given the appellant the writ he seeks But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go We were told that the excise year for this contract (1953-54) expires early in June A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law But as he has in reality won his case and is prevented from reaping the full fruits of his victory because of circumstances for which he is not responsible, we direct that the first respondent, the State of Mysore, and the fourth respondent Thummappa pay the appellant his costs here and in the High Court The other respondents will bear their own costs

Agent for Respondents 1 to 3 R H Dhebar

Appeal dismissed

Fugitive Offenders Act (1881) (44 and 45 Vic, Ch 69), sections 12 and 14—Enforceability in India after the independence of India	(S C) 621
Hindu Law—Oral will bequeathing property to daughter—Gift executed by mother and widow of Testator in favour of the daughter to effectuate the oral will—If confers limited or absolute right in daughter	(S C) 557
Mysore Excise Act (1901) and Rules thereunder—Sale of liquor licences by Government—Necessity to conform to the Rules	(S C) 644
Negotiable Instruments Act (XXVI of 1881), section 32—Drawee of hundi not liable on it to payee, unless he has accepted it—Acceptance cannot be implied from plea of discharge by payee	(S C) 626
Representation of the People Act (XLIII of 1951), sections 81, 83 (1), 83 and 90 (4)—Scope—Election petition sent by registered post reaching the Election Tribunal at Delhi one day beyond the period prescribed—Discretion to condone delay—If can be exercised <i>sub motu</i> —Verification of petition defective—Order for amendment—Discretion to pass—Interference with by Court—Constitution of India, 1950, Article 136—Appeal under—Scope	(S C) 603
Supreme Court Rules, Order 4, rule 30—Legal Practitioner entering into agreement with client to receive 50 per cent of any recoveries he might make in the legal proceedings in respect of which he was engaged—If guilty of professional misconduct	(S C) 631
Taxation of Income (Investigation Commission) Act (XXX of 1947), section 5 (4)—Has become void after the coming into force of the Constitution of India by reason of Article 14	(S C) 611
Uttar Pradesh Sales Tax Act (XV of 1948), section 2 (A) and section 3-B—Definition of "sale" as including forward contracts—Validity—Levy of sales tax on forward contracts— <i>Ultra vires</i> —Government of India Act, 1935, Schedule VII, List II, Entry 48—Scope	(S C) 573
<i>Wajid-ul-arz</i> —Original grant in favour of an individual made responsible for payment of entire land revenue—Other members of his family exempted from payment of land revenue—Subsequent conduct treating all the members as co-owners—Effect—Right of members other than grantee to claim partition—Agreement in <i>wajid-ul-arz</i> —How far enforceable	(S C) 577

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TABLE OF CASES REPORTED.

SUPREME COURT OF INDIA.			PAGES.
Audh Behari v. Gajadhar Jaipura (S C) 590
Bagla v. State of M. P.	..	..	.. (S C) 637
Chhote Khan v. Mal Khan	..	..	.. (S C) 577
Dhirendra v. Supdt., Legal Affairs, W B	..	..	.. (S C) 582
Dinabandhu Sahu v. Mangaraj	..	..	.. (S C) 605
In the matter of 'G', A Senior Advocate	..	..	.. (S C) 631
'C' v. The Hon'ble Judges of H. C. at Bombay	..	..	.. (S C) 630
Gopal Singh v. Ujagar Singh	..	..	.. (S C) 562
Guruswamy v. State of Mysore	..	..	.. (S G) 644
Hem Singh v. Harnam Singh	..	..	.. (S C) 566
Nar Singh v. State of Uttar Pradesh	..	..	.. (S C) 570
Nathoo Lal v. Durga Prasad	..	..	.. (S C) 557
Sales Tax Officer, Palibhat v. Budh Prakash	..	..	.. (S C) 573
S. S. Sontakke v. B. S. Sontakke	..	..	.. (S C) 552
State of Madras v. C. G. Menon	..	..	.. (S C) 621
Suraj Mall Moha & Co. v. Visvanatha Sastri	..	..	.. (S C) 611
Vithlani v. Meghji	..	..	.. (S C) 626
Wazir Chand v. State of Himachal Pradesh	..	..	.. (S C) 600

INDEX TO REPORTS.

Bar Councils Act (XXXVIII of 1926), sections 10 and 11—Order of appointment of tribunal—If can be oral—High Court—If can refer a matter to the tribunal *suo motu* .. (S C) 630

Civil Procedure Code (V of 1908), section 11 and Order 2, rule 2—Applicability—Partition suit—Compromise providing for taking of accounts upto a certain date of the various businesses belonging to the family—Some businesses carried on by some of the parties even after that date—Subsequent suit claiming accounts of such business—Bar of .. (S C) 552

Constitution of India (1950), Articles 19 and 31—Seizure without following proper procedure of goods belonging to a person in Chamba in Himachal Pradesh, with the help of the Chamba police by the Kashmir police investigating an alleged offence committed in Jammu and Kashmir—Infringement of fundamental rights for which relief should be granted under Article 226 .. (S C) 600

Constitution of India (1950), Article 133—Applicability—Decree of High Court of Rajasthan modifying decree of High Court of former Jaipur State—Right to leave to appeal .. (S G) 557

Commutation of India (1950), Article 133 (1) (c)—Scope—"Case"—Meaning—If means case as a whole or of each individual person concerned—Appeal to Supreme Court on certificate issued wrongly—Power of Supreme Court .. (S C) 570

Criminal Procedure Code (V of 1898), section 269 (1)—Power of State Government to direct the trial of all offences or of any classes of offences before any court of session to be by jury—Power to revoke such order—Discontinuance of trial by jury in respect of specified offence only—If offends against equal protection of laws—Constitution of India (1950), Article 14—Scope .. (S C) 582

Custom—(Banaras)—Pre-emption—Nature of right—If personal or incident of property .. (S C) 590

Custom (Punjab)—Jats—Succession—Non ancestral properties—Daughter preferred to collaterals—Daughter can gift the property to her sons and accelerate the succession .. (S C) 562

Custom (Punjab)—Riway-i-am of Gurdaspur District—Answer to question laying down that the adoption of "near collaterals only" was recognised—Not mandatory—Adoption of collateral of eight degrees—Validity .. (S C) 566

Essential Supplies (Temporary Powers) Act (XXIV of 1946)—And Cotton Textiles (Control of Movement) Order (1948)—Constitutional validity—Control Order if in conflict with Railways Act (IX of 1890), sections 27, 28 and 41 .. (S C) 637

[Continued at Cover page 3]

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CONTENTS

				PAGES.
Articles 155—180
Reports 649—730

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[XVII]

THE ADMINISTRATIVE JURISDICTION OF THE INDIAN JUDICIARY THE NATURE AND SCOPE OF THE REMEDIES UNDER ARTICLES 226 AND 32 OF THE CONSTITUTION OF INDIA*

BY

DR A T MARROSE, M A LL D, *Advocate, Ernakulam*

I

Introductory

The experience of India under an imperial bureaucracy for a period of about two centuries showed that restrictions on individual liberty could be imposed effectively by curtailing the power of the judiciary in the remedial¹ field of public law. No wonder, therefore, that the architects of the Indian Constitution were very anxious that no inhibition should exist on the jurisdiction of the ordinary superior judiciary of the land to give remedies for the violation of the liberties of the citizens at the hands of the administration.²

The Constitution, therefore, conferred on the Supreme Court³ and the State High Courts⁴ of India powers to control the administration from violating the rights of individuals. Of these provisions Article 226 of the Constitution⁵ is the most important because it confers power on the State High Courts to issue orders similar to the English prerogative writs.

The Article reads as below —

“(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

1 A needed emphasis was supplied by the Chief Justice of the Calcutta High Court in *Hindustan Motors Ltd v. Union of India*, AIR 1954 Cal 151, 154 by pointing out that Article 226 was only a mere procedural proviso made by the Constitution.

2 Cf. *Jennings*. Some characteristics of the Indian Constitution, 1953, page 6. In Britain the official is frightened of the people with a capital P. In India the official represented power with a capital P. The result in the Indian Constitution is a suspicion of the powers of Government which will certainly prove embarrassing. Cf. also *ibid* page 19.

3 Articles 32 and 136.

4 Articles 226 and 227.

5 Hereinafter referred to as the Article.

* Inscribed to *Acharya Narendra Deo*.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

Proceedings under the Article have become celebrated. Under it aborigines¹ and aristocrats², young hopefuls³ and old revolutionaries⁴ have alike vindicated their liberties and frustrated illegal administrative action. From the Union of India at the top⁵ to local municipal committees at the bottom⁶ all public authorities are under its sway. In Cape Comorin⁷ and the Punjab,⁸ Bombay⁹ and Bengal¹⁰ these constitutional writs run checking *ultra vires* action of Governments,¹¹ abuse of discretion of District Magistrates,¹² excess of powers of Custodians of evacuee property¹³ and commissioners of workmen's compensation¹⁴.

Looking at the prayers contained in not a few of the applications under the Article many would fancy that there are no limits to the jurisdiction conferred by the Constitution on the State High Courts under this Article. Promotions in Universities without passing examinations¹⁵ and specific performance of ordinary contracts¹⁶ control of political parties¹⁷ and political leaders¹⁸ are prayed for.¹⁹ In some Rajasthan cases²⁰ all the writs or any of them except *habeas corpus* were asked.

1 *Kuchra Padhan v. Gangadhar Behera* AIR 1953 Orissa 238. A khond of Orissa obtained an order under Article 226 quashing a decision of the Additional Agent of the Agency Tracts which had deprived the petitioner of his homestead.

2 *Rana Ravi Pratap Singh v. State of U.P.*, AIR 1952 All 99.

3 *Champakam Dorairajan v. State of Madras* AIR 1951 Mad 120. I.L.R. (1951) VI 149, 1950, 2 M.L.J. 404 (F.B.) affirmed on appeal by the Supreme Court in *State of Madras v. Champakam Dorairajan* 1951 S.C.J. 313. 1951 S.C.R. 525 (1951), 1 M.L.J. 621.

4 *K. Gopalan In re* AIR 1953 Mad 41 (1952) 2 M.L.J. 690.

5 *Chhotabhai Jiribhai Patil & Co. v. The Union of India and others*, AIR 1952 Nag 139. I.L.R. (1952) N 156. The Union of India was asked to pay the costs of the petitioner.

6 *Rashed Ahmed v. Municipal Board, Aarana*, 1950 S.C.J. 324. 1950 S.C.R. 566.

7 *Sheik Mansoor v. Government of Travancore Cochin*, 1950 K.L.T. 159.

8 *Man Singh v. State*, AIR 1953 Pepsu 16.

9 *Abdul Majid v. A.R. Nayak*, AIR 1951 Bom 440. I.L.R. (1952) Bom 378.

10 *Nalans Rarjan Guda v. Anantha Shankar Roy*, AIR 1952 Cal 112.

11 See footnote 7 above.

12 *Jesinghabhai v. Emperor* AIR 1950 Bom 363. I.L.R. (1950) B 539, *Rameshwar Prasad v. District Magistrate Kanpur* AIR 1954 All 144.

13 *Naama Khatoon v. R.P. Sinha (Custodian Evacuee Property)*, AIR 1954 Pat 43.

14 See footnote 10 above.

15 *Shaunderham Lal Dwivedi and others v. Dean of the Faculty of Science, University of Allahabad and others*, AIR 1953 All 194. Malik, C.J., and Bhargava, J., who dismissed the petition did not mulct the youngsters in cost because the judges graciously thought that the boys were misguided. Of course Universities are in proper cases amenable to the jurisdiction under Art. 226.

16 *Hong Kong & Shanghai Banking Corporation v. Bhaa Das Pranywan Das* AIR 1951 Bom 158. In this case a writ against a private individual not to enforce an award was asked for. *Chettiar Singh v. State of Madhya Bharat* AIR 1953 Punj 239. *Gondharam v. State of Madhya Bharat*, AIR 1953 M.B. 58, *Devi Doyal v. Pepsu State*, AIR 1953 Pepsu 9, *Indian Tobacco Corporation v. The State of Madras*, AIR 1954 Mad 549 at 551 (1954) 1 M.L.J. 429. Time alone can say whether *Bryl v. State of Uttar Pradesh*, AIR 1954 All 393 will be hailed as a precedent in so far as it recognises Government contracts as a part of public law enforceable by mandamus or forgotten as a freak because it goes contrary to the general law that mandamus cannot be used to enforce contractual obligations.

17 *In re Nagabhushanam Reddi*, I.L.R. (1950) Mad 1119. AIR 1951 Mad 249 (1950) 2 M.L.J. 278.

18 *Naravana Bhaskara Khare v. Pandit Jawaharlal Nehru* AIR 1952 Nag 301.

19 *Cf. Jamalpur Arya Samaj v. D. Ram and others* AIR 1954 Pat 297. See *infra* Section II of this paper.

20 *Nathral v. Commissioner of Civil Supplies*, AIR 1952 Raj 74, *Firm Uday v. Commissioner of Civil Supplies*, AIR 1952 Raj 79. In *Shambhu Doyal v. Pepsu State*, AIR 1952 Pepsu 152, the report states that writs of certiorari, prohibition, mandamus etc. were asked.

The Courts are not entirely free from blame for this condition of apparent anarchy in the form of applications and types of reliefs prayed for under the Article. In many cases the High Courts have created unnecessary diversity where uniformity could have easily been obtained and preserved. For example the very name of the proceedings under the Article is strange to relate, different in different High Courts.¹ As a rule, the Supreme Court is careful in couching the directions issued under Articles 32 and 226 of the Constitution. It corrected the form of order of a High Court in one case² and criticised the wording of an order of another High Court.³ But many State High Courts issue orders under the Article less carefully.

Orders on petitions by dismissed Government employees may be taken as a typical example. According to the Privy Council practice⁴ the proper relief, on finding that the services of a Crown employee are illegally interfered with, is to give a declaration to that effect. That was so done under the Article in *Amip Singh v. State*⁵ while in *Pulin Behari v. The Divisional Superintendent South East Railway*⁶ a suspension order of an employee was cancelled and the employer was directed to forbear from enforcing it on the ground that there was a violation of service rules.⁷ But the Nagpur High Court on a finding that the petitioner was illegally removed from service in *Tribhuanath v. Government Union of India*⁸ set aside the order and reinstated the petitioner, in order as the High Court was pleased to observe "to obviate any administrative difficulties".⁹

There is conflict of views about who are proper applicants¹⁰ and who should be proper respondents¹¹ in *mandamus* applications. Whether there can be remand

1. The Allahabad and Rajasthan High Courts call proceedings under Article 226 civil miscellaneous writs. Cf. AIR 1953 All 63 684 and AIR 1953 Raj 170 13 180. Assam, civil rule, AIR 1953 Assam 145. Calcutta civil revision case AIR 1953 Cal 580-81; civil rule AIR 1953 Cal 587 and simply matter AIR 1953 Cal 519. Himachal Pradesh writ petitions AIR 1953 Him Pra 95 103. Madhya Bharat civil miscellaneous case AIR 1953 MB 222 256. Nagpur miscellaneous petition AIR 1953 Nag 284 291. Punjab civil writ AIR 1953 Punj 225 239 245. Patna, miscellaneous judicial case, AIR 1953 Pat 112 117 235. Travancore Cochin, original petitions AIR 1953 TC 286, 296 323.

2. *Commissioner of Police Bombay v. Gordhan Das Bhasji* (1952) S.C.R. 135 (1951) S.C.J. 803 at 812 (S.C.).

3. *Veerappa Pillai v. Ramani & Ramani, Ltd.* (1951) S.C.J. 261 269 (1950) S.C.R. 277 (S.C.).

4. *High Commissioner of India v. I. M. Ltd.* AIR 1948 PC 121 L.R. 73 IA 225 (1948) 2 M.L.J. 55 (P.C.).

5. AIR 1953 Pepsu 24.

6. AIR 1953 Cal 45 at 47.

7. There is considerable force in a contrary view taken in *Leela Devi v. State of Madhya Bharat* AIR 1952 MB 105 that a petitioner could not come under Article 226 for reinstatement unless he was protected by Article 321, reinstatement being neither a legal nor an equitable remedy under general law. See also *Baldev Singh v. Government of Pepsu* AIR 1954 Pepsu 98 109 last paragraph.

8. AIR 1953 Nag 138 Siba C.J. and Mudholkar J.

9. *Ibid.* at page 141. In none of the above three cases was arrears of pay claimed. In the light of the decision of the Supreme Court in *The State of Bihar v. Abdul Masih* (1954) S.C.J. 300 the employees could have claimed it. What was claimed in the Nagpur case was not arrears of salary (cf. *Ibid.* *supra* para 6 and) but certain compensations and increments (the last payable only after confirmation while the petitioner was still in probation) which would come under the Supreme Court decision in *State of Madhya Pradesh v. M. S. Rao* (1954) S.C.J. 503 (1954) 2 M.L.J. 51 (S.C.).

10. Cf. *Employees Association of Northern India v. U.P. Government*, AIR 1952 All 109 with *The Bangalore District Hotel Owners Association v. The District Magistrate Bangalore and others* AIR 1951 Mys 14.

11. Cf. *State of Sikkim v. State of Punjab* AIR 1951 Punj 90 with *Srinivasa v. Calcutta University* AIR 1953 Cal 177 at 179.

under Article 226 on quashing the decision of an administrative tribunal by *certiorari*¹ is a mooted point. The Nagpur High Court did not lose time by even remanding matters back to the tribunal but declared the final decision which, according to the High Court, the administrative tribunal would have made on remand². While some judges have held that proceedings under the Article cannot be issued against a private individual³ or association⁴ or an institution like a college⁵ some judges are of opinion that proceedings under Article 226 can go against privately-managed institutions like the Pachaiyappa's College⁶. When some judges of the Calcutta High Court⁷ held that the Government of India cannot be said to be located in the State of West Bengal for purpose of proceedings before the Calcutta High Court under Article 226, the Allahabad High Court has expressed a contrary view⁸ about High Court's jurisdiction.

There is uncertainty on the questions when alternate remedy can properly defeat an application under Article 226⁹ and what are the remedies which

1 Cf *Mohamed Osmar Rashmitoola v Labour Appellate Tribunal* AIR 1952 Bom 443 Chagla, C J and Bhagwan J with *Harikishan v Ramachander* AIR 1953 Hyd 56, 57.

2 *Sri Krishnan H Shop v Manak Lal* AIR 1953 Nag 284. *Prfulla Kumar v Nagpur Corporation*, AIR 1953 Nag 291.

3 *In re Thippaswami* (1951) 2 MLJ 171. AIR 1952 Mad 112. Rajamannar, C J and Balakrishna Ayyar J. An application on behalf of a minor was filed in the Madras High Court under Article 226 to restrain respondents who were private individuals from cutting and removing trees from certain survey numbers. The reason for filing the petition under Article 226 was that the petitioner was precluded by the summer vacation from filing a suit in the District Court of Anantapur which was the proper forum.

4 *In re Nagabhushanam Reddi* ILR (1950) Mad 1119 (1950) 2 MLJ 278. Rajamannar, C J and Somasundaram J. A writ of prohibition was asked under Article 226 against the All India Congress Committee. In *Thulasidas Mobayi v The Alleppey Chamber of Commerce* AIR 1953 TC 26 and *Ramesh Chandra v Principal Bepin Behari Intermediate College* AIR 1953 All 90, this aspect was not discussed. *Nundalal v Pravardayal* AIR 1952 Cal 74 was a second appeal in an ordinary suit where by way of obiter the Court (*Ibid* at page 75. Harries C J and Das J.) observed that *mandamus* could be issued only against the holder of a public office and not against a private individual.

5 *Joseph Mundaserry v St Thomas College, Trichur* (1953) KLT 773. *Amerendra Chandra v Narendra Bani*, AIR 1953 Cal 114.

6 *Sekhar v Krishnamoorthy* (1951) 2 MLJ 568. AIR 1952 Mad 151. Writ was not issued but Subba Rao J., was of the view that a writ could be issued against an institution like the Pachaiyappa's College.

7 Harries C J and Mukherjee J in *Lloyds Bank Ltd v Lloyds Bank Staff Association* and *Sukhlal Chundermull v A N Shah* referred to and followed by Subba J., in *Ramesh Chandra v Director-General of Observatories New Delhi* AIR 1953 Cal 767.

8 *Magbulunissa v Union of India* AIR 1953 All 477 (FB). After the Supreme Court decision in *Election Commission v Saka Venkata Rao* (1953) SCR 1144. (1953) SCJ 293 (1953) 1 MLJ 707 the above Allahabad decision may need scrutiny to see whether the State Government should not be deemed an original authority involved in that case.

9 The point on appears to have cleared up a little in matters of taxation. In *Himmattal Harlal Mehta v State of Madhya Pradesh* (1954) SCJ 445 (1954) 1 MLJ 590 (SC) the Supreme Court held that where a law purporting to levy sales tax was found to be *ultra vires* even a threat by the State (which arose in this case only by the existence of the impugned law on the Statute Book of the State to enforce its coercive machinery for the collection of the tax is a sufficient infringement of a citizen's fundamental right to carry on his trade and profession so as to entitle him to call for relief under Article 226 of the Constitution. The Court observed that the rule declaring the applicability of Article 226 to such cases was laid down in *State of Bombay v United Motors Ltd*, AIR 1953 SC 252 (1953) SCJ 373 (1953) 1 MLJ 743. In that case also the law imposing sales tax was challenged as illegal but unsuccessfully. The principle of interference in both cases was said to have been that laid down in *Mohamed Tamm v Town Area Committee, Jalalabad* AIR 1952 SC 115. 1952 SCR 572 (1952) SCJ 162. But this was a case where a licence fee was attempted to be imposed under an illegal bye law of the committee and the Supreme Court distinguished on that score an earlier decision *Ramjilal v Income tax Commissioner* (1951) SCJ 203 (1951) 1 MLJ 384. AIR 1951 SC 97 in which the Court declined to interfere under Article 32 with the levy of income-tax on the ground that the applicant's only grievance in that case was that the income-tax officer wrongly assessed him. In such cases there was no violation of fundamental rights.

may be considered as proper alternate remedies ¹

The effect of delay on applications under Article 226 is another area of uncertainty ² The same proposition is held by one High Court to be correct³ and by another⁴ to be wrong⁵ When the Madras High Court holds that a mere member of the public has no *locus standi* to file a writ of *quo warranto*⁶ the Calcutta High Court holds otherwise⁷ When an administrative procedure of the Board of Revenue was declared illegal by the Allahabad High Court⁸ a similar practice was held to be within the powers of the Board by the Rajasthan High Court.⁹

How far conflicts consequent on the denial by one party of facts affirmed by the other can be resolved in proceedings under Article 226 itself, is an important question which remains to be decided ¹⁰

These conflicts are indications that Courts are not law-manufacturing slot-machines and that the theory that Courts only discover law is a myth But these conflicts have graver consequences in administrative law than similar conflicts have in private law or litigation It is sufficient at this place to point out that they

The principle that appears to emerge from the above rulings is that where taxation is under an unconstitutional law original or subordinate the High Courts and Supreme Court can interfere under Articles 226 and 32 respectively while if the grievance is only that the taxing authorities are in error in proceeding under a valid law then statutory remedies are to be exhausted before Court relief is claimed

1 Compare the following pairs of decisions *Bahdar Singh and others v Jaganmoy Mehta and others* AIR 1953 Raj 158 (DB) and *Chatter Su & v State of Madhya Bharat* AIR 1953 M.B. 223 (D.B.) *Adinarayan and Bros v State of Madras* AIR 1950 Mad 830 (1952) 2 M.L.J. 27 following *Provinces of Madras v Sathyanarayana Murthy* AIR 1950 Mad 283 (1951) 2 M.L.J. 340 and *Cosmopolitan Club v Deputy Commercial Tax Officer* AIR 1952 Mad 814 (1952) 1 M.L.J. 401, *Ram Shankararam v Government of Hyderabad* AIR 1953 Hyd 19 at p 96 and *Ranjay Singh v District Forest Officer* AIR 1955 Him Pra 33 *Sanni v Puri* AIR 1951 Bom 423 and *Indian Engineering Co v Shibu Ram* AIR 1951 All 746 at p 69 (F.B. para. 62 per Mulla C.J.)

2 *Vasanthan v Lankarathan* (1950) 2 M.L.J. 448 AIR 1951 Mad 250 *Abraham v State*, (1953) K.L.T. 703 Cf *Rajasthan Milk Owners and Mineral Merchants Association v State of Ajmer* AIR 1953 Ajm 2 where after a discussion on various decisions on the subject a delay of seven months was held fatal *Banmalal Dalbhehra v Chairman Provincial Authority and others* AIR 1953 Or 235 the petition was dismissed in this case on the ground of delay though on the illegality of administrative act there was little doubt *Mehab Chetwar v Commissioner of Income Tax*, (1951) 1 M.L.J. 417 I.L.R. (1951) Mad 815 AIR 1951 Mad 704 *Mahabir Singh v State of Rajasthan* AIR 1953 Raj 22 *Rajendran Das Service Company v Appellate Transport Authority*, AIR 1953 Nag 80 followed in *Mohamed Yarmunda v Tithyan and another* AIR 1953 Nag 251 The last two decisions as overruled in *State of Madhya Pradesh v State of Madhya Pradesh* AIR 1954 Nag 151 (F.B.) The order of Govinda Menon J in *Indrakumar v State of Madras* 1954 1 M.L.J. 244 AIR 1954 Mad 581, 582, 589 appears to represent the correct position

3 *S. Hukkam Singh Sham Singh v S. Sarda Singh Aspal Singh* AIR 1953 Peps 133

4 *Shankar and others v G. Oak and others* AIR 1953 All 633

5 With the result that the Election Tribunal is under the Representation of the Peoples Act 1951 which inclusion under different High Courts have to follow conflicting interpretations of the identical legislative provision

6 *In re Chakrabarti & Co v AIR 1953 Mad 19* 2 M.L.J. 719

7 *Bhira Chandra v Government of West Bengal and others* AIR 1952 Cal 69

8 *Suresh v Board of Revenue U.P. and others* AIR 1953 All 261 (F.B.), overruling *Ram Manohar v Board of Revenue U.P.* AIR 1952 All 90 The old proposition has been restored by a later statute See *Mahabir Singh v Board of Revenue U.P.* AIR 1954 All 154

9 *Borah v Board of Revenue Rajasthan* AIR 1953 Raj 4

10 Contrast *Ramji Ram Bora v Chakrabarti & Co v AIR 1951 Azam 163* at 167 last sentences of the judgment and *Banerji & Co v Government of P.W. AIR 1954 Peps 93* at 103 para 10 with the observations of the Supreme Court in *State of Orissa v Maitra & Co* (1952) 2 M.L.J. 613, 101 S.C.J. 64 at 6 1953 S.C.P. 23 last but one sentence and *Bhila v State of Uttar Pradesh* AIR 1954 All 303 at 401

add force to the arguments of the school that would fain pluck off the powers of the Courts over the administrative process¹

A tendency which deserves mention at this place is the attitude of judiciary in the interpretation of certain statutes which would give legitimate room for doubt whether they are rightly understanding the prevailing social ideals represented in such legislation. For example, the interpretation of rent control legislation in some decisions appear to favour the landlords and to that extent fly in the face of the legislative intent. Such interpretation provokes further legislative intervention and thus leads to complexity of the law²

The views of the High Courts on the use of English cases in the matter of the issue of directions under Article 226 are diverse. Some learned Judges express the opinion that the Article has given such powers to the High Court that English decisions on high prerogative writs may not be of any help³ while others have gone to the extent of saying that the English law relating to these writs must govern the issue of the writs herein so far as they are not opposed to our Constitution⁴. The very insertion in our Constitution of the names of the high prerogative writs known to English common law is taken by some to give an indication in the Constitution that in exercising the jurisdiction under Article 226 the Courts are to follow the general principles on which the English Courts issue these reliefs⁵.

The Supreme Court of India is slowly covering these areas of uncertainty regarding the principles of Court control of official action. The important question whether the jurisdiction under the Article can be excluded or restricted by legislative provision which has been left open⁶ is now answered in the negative⁷. The equally important question whether the writs that the High

¹ Cf. an article by the present writer on the writ of *certiorari* in (1953) *Ind. An. Law Review* 189 at 217-238.

² Cf. *Sakharampant v. K. L. Lodh* AIR 1953 Nag 263. The view of the learned Chief Justice in *Cornes Oaks v. Chief Judge Small Cause Court* AIR 1951 Mad 222 at 223 I.L.R. (1951) M 330 (1950) 2 M.L.J. 317 may appeal to many as more correctly reflecting the legislative intent than that expressed by Viswanath Sastri J. in the same case *Mallikaraju Bhacmappa v. Satya narayana* AIR 1953 Bom 207 may *prima facie* create misunderstanding.

³ Kaul C.J. in *Dayabhai v. Regional Transport Authority* AIR 1951 MB 121 at 130 para 57. Mack J. in *Cosmopolitan Club v. Deputy Commercial Tax Officer* AIR 1952 Mad 814 at 816 (1952) 1 M.L.J. 401 para 7. In evolving our own case law under Article 226 of the Constitution which confers on High Courts far wider powers than those exercised by the King's Bench Division in England, it is in my view neither necessary nor is it possible to follow the precedents in English prerogative writ and other writ case law.

⁴ *Per Banerjee J. in Union of India v. Elbridge Watson* AIR 1952 Cal 602 at 603, *Malik v. C.J. observed in Mohal v. U.P. Government* AIR 1951 All 257 at 263. In my mind we must apply the same principle which was applied in England in dealing with the prerogative writs. *Per Gurus J. in Baburam v. State of U.P.* AIR 1953 All 641 at 646. If the guiding principles in regard to the jurisdiction under Article 226 may be taken from the reported English cases there seems no reason why the latest accepted position on in England should not be considered as applicable to India also. In *Garishad Mineral Waters Manufacturers Co. v. H. M. Jagham* AIR 1942 Cal 315 the English law of *mandamus* is discussed and followed by J. P. Mitter, J. This is only one of many such cases.

⁵ Cf. *Harendran v. Sharma v. State of Madhya Bharat* AIR 1950 MB 46 at 51 per Dixit J. *Jinnabhai v. District Magistrate Ahmedabad* AIR 1950 Bom 363, I.L.R. (1950) B 539. *Ramappa v. State of Madras* (1951) 2 M.L.J. 597. AIR 1952 Mad 300 301. The most interesting divergence of view is disclosed in *Bha Lal Additional Dep. Dy. Commissioner Akola and another*, AIR 1953 Nag 89 (FB Hemeon J. at p 103 para 91, Mudholkar J. at p 110 para 118 a more qualified view per Deo J. at p 117 para 153 a warning and Imdayatullah J., at pp 94-95 para 23.

⁶ *Parry & Co. Ltd. v. Commercial Employers Association and another*, (1952) S.C.J. 275 at 278 1952 S.C.R. 519 (1952) 1 M.L.J. 513 (S.C.).

⁷ *Raj Krishna Bose v. Dinod Kanungo* (1951) S.C.J. 286 (1954) 1 M.L.J. 489 (S.C.).

Courts can issue under Article 226 must be analogous to the high prerogative writs known to English common law or whether the High Courts are at liberty to issue any suitable directions or orders or writs untrammelled by any condition whenever interests of justice so require which had been expressly left open¹ is now answered²

The view of the Supreme Court given in one case³ was that the powers given to the Supreme Court under Article 32 are much wider and are not confined to issuing prerogative writs only⁴. In a later case it was observed that the Supreme Court has been given power to make orders and issue directions or writs *similar in nature* to the prerogative writs of English law as may be considered appropriate in particular cases even though Article 32 gives a very wide discretion in the matter of *framing* the writs to suit exigencies of particular cases. In a still later case⁵ the Chief Justice of India delivering the judgment of a unanimous bench of five judges stated that the words "for any other purpose" were added in Article 226 to place all the State High Courts in this country in *somewhat*⁶ the same position as the Court of King's Bench in England. In the exposition of the principles regarding issue of writs the Supreme Court has cited and followed the leading cases on prerogative writs decided by English Courts and the Privy Council⁷. A synthesis has been struck in the path clearing judgment of that very learned judge Mukherjea, J., of the Supreme Court in *Basappa v. Nagappa*⁸ to the effect that by virtue of the express provisions of the Constitution Indian courts are freed from the historical and procedural technicalities of English prerogative writs and the different shades of opinions of English judges and empowered to grant the reliefs mentioned in Articles 32 and 226 in all appropriate cases and in appropriate manner so long as they keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law⁹.

However we see that on almost every aspect of judicial control under Article 226 there is confusion if not conflict. The dicta of judges and the decisions of Courts do not remove the clouds over concepts that need urgent clarification.

In a short paper of this nature it is not possible to find out generally acceptable solutions for all the problems raised above. But it is felt that a firm basis can be prepared for the building up of proper principles for the issue of reliefs under the Article provided the exact nature of the jurisdiction conferred on the State High Courts is authoritatively settled. It is, therefore, the main object of this paper to enquire into the nature and scope of the jurisdiction of the Indian High Courts under Article 226 of the Constitution.

¹ *Veerappa Pillai v. Raman and Raman Ltd.* (1932) S.C.J. 461 at 467 (1932 S.C.R. 583 (1932) 1 M.L.J. 806.

² *Basappa v. Nagappa* A.I.R. 1934 S.C. 440 443 (para. 6).

³ *Rashid Ahmad v. Municipal Board, Amritsar* (1930) S.C.J. 325 at p. 327 per Das J., for a unanimous Court.

⁴ *Charanjit Lal v. Union of India* (1931) S.C.J. 297 (1930 S.C.R. 869 at pp. 45 46 per B. K. Mukherjea J.).

⁵ *Election Commissioner v. Saka Venkatarao* (1933) S.C.J. 293 at p. 296 (1933) S.C.R. 1144 (1933) 1 M.L.J. 707.

⁶ It may take a decade to find out the import of this word "somewhat".

⁷ Cf. *Parry & Co. v. Commercial Employees Association* (1932) S.C.J. 275, (1932) S.C.R. 519 (1932) 1 M.L.J. 813 and *Ebrahim Bhoobakar v. Custodian-General, Evacuee Property*, (1932) S.C.J. 483 (1932) S.C.R. 606.

II

For the present enquiry it is necessary to confine our attention to the issue of directions against public bodies alone. The issue of mandamus against private corporations which is a well established but narrow jurisdiction and presumably available under Article 226 and the possible availability of these remedies under Article 32 against private individuals or associations when violations of certain fundamental rights occur are not taken up at this place.¹

(a) **The Nature of the Jurisdiction.**

There have been some attempts to coin a compendious expression to indicate the nature of this jurisdiction. It has been called a 'revisional jurisdiction'.² But the existence of the very next Article, namely, Article 227, which as interpreted by the various High Courts, includes the power of judicial revision³ is effective to negative the argument that Article 226 is to provide a revisional jurisdiction.⁴ The Chief Justice of the Calcutta High Court has called the jurisdiction under Article 226 a 'special jurisdiction'.⁵ This is correct, if we may say so, in one respect, but is inadequate to suggest the exact nature of the power wielded under that Article.⁶ When the different jurisdictions of the State High Courts are given their familiar names from the point of view of subject-matter, like civil criminal, matrimonial, insolvency, admiralty, testamentary and intestate, there will be no doubt that from the point of view of subject matter, jurisdiction under Article 226 is *administrative jurisdiction*. The power under Article 226 is intended to make the administrative processes of the country to conform to the legal order. It is a jurisdiction in relation to the administrative system, in other words, it is the *administrative jurisdiction*.

The term administrative jurisdiction though not very familiar in India is known in the United States and the continental countries.⁷ What is meant by 'administrative jurisdiction' in this context is the power exercised by the High Courts under Article 226 over governments and administrative officers of the country whether they belong to the Union Government, State Government, Municipal Government or independent public authorities like the Damodar Valley Corporation or the Indian Tea Board.

From a different point of view jurisdiction of Courts is divided into original and appellate. There is a very peculiar meaning to the term 'original jurisdiction' in India. This is as applied to the Presidency High Courts of India and was restricted territorially broadly to the Presidency Towns. This is a historical detail which need not detain us here.⁸ The meaning of 'original jurisdiction' which we

1 That matter is discussed in Section IV of this paper.

2 Cf. *Budge Budge Municipal Corp. v. Mongra Msa* AIR 1953 Cal 433 at p 441 para 29 and *Ramappa v. State of Madras* (1951) 2 MLJ 597 AIR 1952 Mad 300 at p 303 para 9.

3 *Motilal v. State of U P* AIR 1957 All 963 at 966 (FB) *Sahitri Motor Service Ltd. v. Assamul Bus Assocn* AIR 1951 Assam 106 109 per Ram Lohiya J. *Purelal v. Fazirchand* AIR 1951 Punj 108, *Sarna v. Patil* AIR 1951 Bom 423 at 426.

4 Whether the two Articles 226 and 227 do overlap and if so to what extent is not for us now to discuss.

5 *Budge Budge Municipal Corp. v. Mongra Msa* AIR 1953 Cal 433 at 441, para 28 per Chakravarti C.J.

6 Subba Rao J. calls it the power to issue constitutional writs in *Ponnusami v. Returning Officer Namakkal* (1952) SCJ 100 (1952) SCR 218 1952 1 MLJ 775 782.

7 The term is used by Prof. Goodnow in his *Comparative Administrative Law*, Vol II, p 146, et seq. (1893) Students' Edn.

8 Clause 11 of the Letters Patent of the Calcutta High Court dated 28th December, 1865, prescribed the local limits of this ordinary original jurisdiction of the Calcutta High Court.

it is always a civil action or in the nature of a civil action¹ Regarding *quo warranto* historically it was in form a criminal proceeding. But down through the centuries it so much transformed itself into civil proceeding that by the Supreme Court of Judicature (Consolidation) Act, 1925 section 48, it is declared that proceedings in *quo warranto* shall be deemed to be civil proceedings for purposes of appeal or otherwise.

Whatever might be the justification for the Anglo American jurisdictions to continue their differences of opinion it is not necessary that India should follow suit when she has got an opportunity to begin afresh. The rules for proceedings under Articles 32 and 226 can be framed on the basis that all these proceedings are of a civil nature without regard to the nature of the proceedings which calls forth these remedies. Logic will compel and analysis of the intrinsic nature of these proceedings will persuade the student to call these proceedings 'special proceedings'. If one may use the language of chemistry these remedies in one respect have resemblance to catalytic agents in that they themselves remain unchanged when effecting the change of other matter.

(b) The General Scope of Article 226

Regarding the general scope of the powers conferred on the Indian High Courts by Article 226 of the Constitution two points of view are in evidence. These views came up in striking contrast in a Nagpur Full Bench of five Judges in *Bhailal Jagadish v. Additional Deputy Commissioner Akola and another*². According to the view of the majority³ the Indian High Courts have been given under Article 226 of the Constitution untrammelled powers not only to correct patent errors of law, excesses and abuses of power and violation of the rules of fair procedure but also to interfere with findings of fact of administrative tribunals⁴ and to substitute their own decisions for those of the inferior tribunals which they set aside.

According to the minority view the Indian High Courts in the exercise of their powers under Article 226 of the Constitution are to follow as far as possible the English decisions on the extraordinary legal remedies and in the case of administrative tribunals the High Courts can only quash the decision of such tribunals but cannot substitute the Courts own decisions or dictate to the tribunals the particular decision which they should enter.

In the introductory section we have noted many directions of the High Courts under Article 226 of the Constitution issued to control orders of an administrative nature which went beyond the English practice in similar matters. But in the matter of the writ of *mandamus*—India had advanced even before the advent

1 Cf. 9 Hals. 804 para 1373 and foot note p. Even regarding *mandamus* (Cf. Bailey op cit. p. 776) it will be found that proceeding in *mandamus* is not such a suit of a civil nature for all purposes. Regarding *habeas corpus* the Supreme Court of Georgia holds the view (Cf. Bailey op cit. p. 12) that proceeding in *habeas corpus* is of a special nature. It is neither civil nor criminal nor a cause or action and there being no plaintiff and defendant there is no suit in a technical sense.

2 That was why it was stated before that the observation of Chakravarti C.J., that jurisdiction under Article 226 is a special jurisdiction was correct in one sense. Cf. *Budge Budge Municipality v. Afongra Mia* AIR 1953 Cal 433 at 441 para 28.

3 AIR (1953) Nag 89.

4 *Ibid.*, supra Sinha C.J. and Hidayatullah J. took one view and Hemayat, Mithalkar and Desai JJ., took the other view.

5 *Badamani Bai v. P. A. Tobin* (1952) 1 L.J. 426 (DB) discussed in para 128 in *Bhailal*, case AIR (1953) Nag at p. 112 by Desai J. shows how believing one engineer in preference to another the High Court quashed a decision of a rent tribunal.

of the present Constitution—much beyond the stage reached by the writ of *mandamus* in England¹. But the extreme view has more relevance to decisions of inferior administrative tribunals like the Rent Control Tribunals than to orders of public authorities which are of an administrative nature. In fact, reading of Deo, J's judgment in *Bhailal's case*² would give one the impression that the lapses of the Madhya Pradesh Rent Tribunals and Transport Authorities were the provocations for their Lordships³, to take this extreme view.

In this case the applicant for *certiorari*⁴ who was an importer of coal and who was storing it on another's land was obliged to remove his business to one of his own plots in the same town. The applicant had let the adjacent plot to the second respondent for a period of five years. The expansion of the business of the petitioner compelled him to get this plot and when the lease expired he applied to the rent controller for permission to terminate the tenancy.

If the need of the petitioner was genuine he had a right to get that permission,⁵ and under the relevant law⁶, a person aggrieved by an order of the Rent Controller had a right of appeal to the Deputy Commissioner within fifteen days of the date of decision and the appellate decision was final and immune from further appeal or revision or review. The 7th section of the Act excluded every other authority from entertaining any appeal or revision from the decisions of the prescribed authorities already mentioned.

The Rent Controller found that the petitioner's need for an open site for the storage of coal was genuine. But he dismissed the application of the ground that the petitioner can satisfy his needs by erecting a structure on the plot on which he was then storing coal. This view of the Rent Controller was taken by the appellate authority to mean that the petitioner's need was not real and on this ground his appeal was dismissed. The petitioner prayed for an order of writ of *certiorari* under Article 226 to quash the decision of the appellate authority⁷. The matter initially came before a division bench which found the decisions of the rent tribunals to be wrong. But the Judges disagreed on the exact form of the order that should be issued. Sinha, C J, following his decision in *Sagatmal v. Additional Deputy Commissioner, Nagpur*⁸, was of the view that the High Court can only quash the decision of the appellate authority but must leave to the rent tribunals appointed by law to make the correct decision in the light of the High Court judgment. Mudholkar, J, the other learned Judge who sat with him, following some earlier cases⁹, held that

1 This point is illustrated by the present writer in 1953 S.C.J. Journal Sectional at p. 125 in a paper entitled "The Executive and the Judiciary—Some Suggestions for Reform".

2 AIR (1953) Nag. 89 at 110-112.

3 Who constituted the majority in the above Full Bench.

4 Their Lordships who delivered the majority judgments have gone beyond the relief prayed for by the applicant.

5 Section 7, clause 13, 3 (ii) Central Provinces and Berar Letting and House Rent Control Order, 1949.

6 Madhya Pradesh Regulation of Letting and Accommodation Act II of 1946.

7 In fact the petitioner should have prayed for quashing the orders of both authorities when the impugned appellate order confirmed the lower tribunals' order. Otherwise the original order will remain valid. Cf. 9 Hals. 373 para. 14, citing *Staff R. Country Lane v. Arlman v. Soc. L. on Guarantors* (1897) 61 T. 194. It is seldom that this principle is enforced in India.

8 I.L.R. 101 Nag. 60. AIR 1952 Nag. 4 sub-nom. *Sagatmal Bhattacharya v. M. I. Deo & others*.

9 *Misra v. G. C. D. v. Deputy Commissioner, Indral* (1951) Nag. L.J. 346. I.L.R. 1051 N. 791, *Raoji v. Anand* 1051 Nag. L.J. 365. *F. M. Deshpande v. A. M. Anand* I.L.R. (1951) Nag. 808. AIR (1951) Nag. 51. Four other decisions of the Nagpur High Court are cited on page 107 of AIR (1953) Nagpur which are unreported.

in such cases the High Court under Article 226, can, not only quash the decision of the administrative tribunal but substitute its own orders and finally decide the matter in the High Court itself without any further resort by the parties to the tribunal whose decision came before them. The matter was therefore referred to a Full Bench of five Judges and by a majority of three¹, the view of Justice Mudholkar was upheld.

This view, therefore makes ineffective, as it did in this case all legislative provisions that confer finality on administrative decisions. According to this view when section 7 of the Madhya Pradesh Regulation of Letting and Accommodation Act (II of 1946) provided that no other authority except those empowered under the Rent Control Order shall entertain any appeal from the decisions of those authorities the Nagpur High Court could entertain what is in effect an appeal, substitute its own decision and pass an order which restored to the landlord his house. During the inevitable delay caused by the proceedings before the Rent Controller Appellate Authority and the High Court, if the landlord had acted upon the advice given by the Rent Controller and built a structure on his original plot itself then even though the decision of the rent tribunals might be wrong from the point of view of strict law the necessity to terminate the tenancy of the adjacent plot would not arise. The rent tribunal will be more competent to take stock of such developments and to that extent it is expedient that the High Court leaves the actual decision of the case to the tribunal appointed by the statute to discharge that function. The causes for the creation of special administrative tribunals like the Rent Tribunals were the inability of the ordinary Courts to cope with the large number of cases, the incapacity of the tenants to bear the cost of ordinary litigation and the need for expeditious disposal of disputes. If, in every case, under Article 226 the Court is to interfere in the way suggested by the majority, the very reason for the establishment of such tribunals will vanish. The administrative process will become a costly duplication of machinery and Judges will be conducting the effective administration of the country.

The moderate view, on the other hand advocated the adoption of the well-established principles of English Crown Practice. As Hidayatullah, J., who wrote the dissenting judgment in the case stated the view already mentioned to be that of Sinha, C.J. and Hidayatullah, J.², to determine the powers given to the High Court under Article 226 said that the established jurisprudence of the countries where such writs obtained was a surer and clearer guide than the observations of any lecturer³, advocating his view.

1 See foot note 3 on page 174 ante. Hemeon J. cited the following cases from other High Courts: *Bra nandan Sarm v. State of Bihar* AIR 1950 Pat 32 I.L.R. 29 Pat 461; *Jengal abhai v. District Magistrate Ahmedabad* I.L.R. 1950 Bom 539 I.N.A. 1 v. *State of Orissa* AIR (1951) Orissa 86; *Shyam abada v. Abani Mohan* AIR (1951) Cal 400; *R.A. Bose v. Chelchis Uniruly* AIR 1951 Assam 113; *Flis v. Watson v. R.A. Da* AIR 1951 Cal 430; *Saeedah Khatoon v. State of Bihar* I.L.R. 30 Pat 21; *S. Nymal v. Asst. Controller of Customs* AIR 1950 Cal 103. It is submitted that none of the above decisions warrant the Mudholkar view that under Article 226 the High Court can after quashing the decisions of a tribunal like the Rent Tribunal substitute its own decision and dispose of the case finally. Further this view appears to be contrary to the import of the Supreme Court Judgment in *Tejrao Pillay v. Raman & Raman Ltd* (1952) 1 S.C.J. 261; 1952 S.C.R. 583 (1952) 1 M.L.J. 806 (S.C.).

2 AIR 1952 Nag 89 at 102.

3 The learned Judge was referring to the Hamlyn Lectures of Denning J. published under the name *Freedom under Law* and relied upon by Deo J. Cf. AIR 1953 Nag 89 at 118. But in justice to Lord Justice Denning it may be pointed out that what that learned Judge had in mind was decisions like *Fernand & others v. National Dock Labour Board & others* (1953) 2

The advocates of both views were appealing to the wording of Article 226 and the intent of the Constituent Assembly. It is therefore necessary to interpret Article 226. We have already quoted the Article *in extenso*. Three groups of words which give support to the extreme view are

(i) Every High Court shall have power to issue "to any person or authority including in appropriate cases any government",

(ii) Every High Court shall have power to issue "directions orders or writs including writs in the nature of habeas corpus", etc.,

(iii) Every High Court shall have power to issue directions for the enforcement of the rights conferred by Part III "and for any other purpose".

In England no prerogative writ can go against the Crown. Courts in England and in America and for that matter in every country following the English Common law of England including Burma under the New Burmese Constitution¹ can issue only orders in the nature of the five writs named in our Article. The Supreme Court of India can issue the remedies mentioned in Article 32 only for the enforcement of fundamental rights while the High Courts are given power to issue them for any other purpose also. These factors have influenced greatly the Mudholkar view which on the words of the Article holds that the High Courts have a boundless jurisdiction limitable only by self control.

It may be helpful for the interpretation of Article 226 of our Constitution to remember the words of a very learned Australian Judge² that when the draftsmen of a modern Constitution are at their task they may be supposed to have known "that there have been in this world many forms of Government, that the various institutions and attributes of several forms had been the subject of intelligent discussion for more than two thousand years and that some doctrines were generally accepted as applicable to them respectively". Applied to Article 226 this observation helps us to remember that the writs named in the Article were in existence in the common law world for centuries.

Even though our Constitution deserves great encomiums handsomely paid by many³, the plan of the Constitution strikes a balance, as far as fallible men can do, between social security and individual liberty. Complete strength of action

W.L.R. 995 (C.A.) Denning I.J. apparently wanted the development of the actions of declarator and injunction and the power to order a case stated and not the subversion of established principles of prerogative writs. See *Freedom Under the Law*, pp. 95-96 and 125-126. Consult the *National Dock Labour Board case*, (at p. 1009) where Denning L.J. recognises the limitations of *certiorari*.

¹ Article 23 (2) of the Burmese Constitution which corresponds to Article 32 of Indian Constitution states "Without prejudice to the powers that may be vested in this behalf in other Courts the Supreme Court shall have power to issue directions in the nature of *habeas corpus*, *mandamus*, prohibition *quo warrant* and *certiorari* appropriate to the rights guaranteed in this chapter". It is of some interest that Sir B.N. Rao who was the Constitutional Advisor in India when the Indian Constitution was being drafted worked in that capacity with the Burmese Government when the Burmese Constitution was drafted.

² Griffiths C.J. in *Baxter v Commissioner of Taxes* 4 C.L.R. 1037 at 1107.

³ Mahajan J. stated in *Gobalan v State of Madras* (1950) S.C.J. 474 at 249, 1050 S.C.R. 83 (1950) 2 M.L.J. 42 that by making justice the first objective in the solemn declaration in the preamble of the Constitution our Constitution has become sublime. Vivian Bose J. declared in *Krishnan v State of Madras* (1951) S.C.J. 433 at 466, 1951 S.C.R. 621 (1951) 2 M.L.J. 105 that "if we brush aside for a moment the pettiness of the law and forget for the nonce all the learned disputat on about this and that and and or or or may and must and look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution we will see that the right of individual freedom and the sanctity of the individual are recognised again and again and that our Constitution is in violent contrast to those States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power".

to maintain not only the security of the Union but also its solidarity against any intransigent state is given in the Constitution. Care is taken to ensure that individual liberty shall not degenerate into license and create disorder or anarchy. The executive is given power to carry on in war and peace, in time of emergency and normality. The parliamentary type of executive under the present practice of party system creates executive control of legislature and increases the power of the executive. Thus a very strong executive has been provided by the Constitution. Being a Democratic Republic it was thought proper that the legal liability of public authorities and their amenability to judicial control should both be provided for. Thus legal liability of the Union and the States is retained under Article 300¹ and that of the President and Governors under Article 361². Very close analogies for these liabilities existed in the pre-existing law but the administrative jurisdiction³ of the Indian judiciary was extremely circumscribed territorially and with regard to subject matter and persons. The high prerogative writs known to English law could be issued only by the three Presidency High Courts and that within their ordinary original civil jurisdiction⁴. In 1877 section 45 of the Specific Relief Act substituted an order in the nature of *mandamus* and section 50 abolished the common law writ of *mandamus*. Eventually a truncated *habeas corpus* was put in section 491 of the Criminal Procedure Code and made available to the population of India and the common law writ was taken away. From the ordinary original civil jurisdiction of the Presidency High Courts every matter relating to revenue and its collection was excluded. The common law rule that none of these writs will go against the Crown operated in India at first perhaps because of the wrong disclaimer of jurisdiction by *Impey*⁵, and later because of the statutory framework into which *mandamus* and *habeas corpus* were thrown⁶. This protected the Government as such from prerogative orders so that unless by some law a duty was cast upon a specific authority it was not possible to get redress for official wrongs even within the ordinary original jurisdiction. The actions of declaration⁷ and injunction under the Specific Relief Act were less expeditious and were more restricted and they did not adequately develop to do duty for the prerogative writs which were not available over the major portion of the country.

The objects of the present Constitution in this sphere were to liberate the judiciary of India from these shackles of the past, to make the remedies of adminis-

1 Which existed from early times. Some of the statutory predecessors of Article 300 of the Constitution are section 63 of the Government of India Act 1858, section 32 of the Government of India Act 1915 and section 176 of the Government of India Act, 1935.

2 Following with some difference section 306 of the Government of India Act 1935 and section 110 of the Act of 1919.

3 This term is used in the sense explained earlier.

4 Outside the original jurisdiction it extended to European British subjects.

5 *Rex v. Warren Hastings* (1775) 1 D (OS) Vol 1 1005. This view was held to be wrong in *Royds of Garabandha v. Zamindar of Patekmeda* 1 I.R. (1944) Mad 457 at 485 87 L.R. 70 I.A. 129 (1943) 2 M.L.J. 254 (P.C.).

6 It is not possible here to narrate this part of the evolution of writs in India. The English Crown Practice under which the writs were to be taken out in the name of the Rex or Regina as the case might be was altered in India and any eligible applicant could move in his own name and we get the names of the actual parties who are involved in the proceedings. United States moved from 'Rex' to 'State' but not to the name of the applicant.

7 It is held in *Narayana Prasad v. Indan Iron & Steel Co.* A.I.R. (1953) Cal 695, that regarding declaratory action section 42 of the Specific Relief Act is exhaustive and that section 42 does not permit a declaration that an Ordinance is *ultra vires* even though such a suit is maintainable in America and England. But this view is not accepted by Madras High Court nor does this view appear to take into consideration *Fisher v. Secretary of State*.

trative jurisdiction known to Indian law—*habeas corpus mandamus certiorari* prohibition and *quo warranto*—available over the entire area of the Republic to remove the veto on matters relating to revenue to save and conserve the developments that had hitherto taken place in Indian law itself in these remedies and to rope in wherever advisable the reforms and progress that have taken place in England and other countries that had these remedies. Thus every High Court in the Union was given the right to issue directions in the nature of the ancient prerogative writs throughout the territories in relation to which it exercised jurisdiction. The proviso to Article 225 expressed that the jurisdiction of certain High Courts are liberated from the crippling inhibition that existed on their original jurisdictions in matters of revenue and their collection. Further in order to avoid any misconception that the remedies given under Article 226 are identical with the old unreformed prerogative writs the words orders and directions were also added to the word writs. It is not to be forgotten that the power given to the three Presidency High Courts exercisable within the limits of their ordinary original jurisdiction under S 43 of the Specific Relief Act 1877 was simply called order while in the legislative provision giving the substitute for the writ of *habeas corpus* in 1923 in section 491 Criminal Procedure Code we have the expression directions in the nature of *habeas corpus*. The words orders and directions found in Article 226 therefore can be clearly interpreted to reflect the intention of the Constitution not to lose the benefit of the jurisprudence (as far as they are applicable) developed under these two sections. Again every prerogative writ except *habeas corpus* had been abolished in England and orders of the same names were substituted.¹ The main effect of this reform was the deletion of the old procedure of rule nisi and return. The writ of *habeas corpus* was left intact in England because it had already been reformed by a series of *Habeas Corpus Acts* and perhaps also because the English nation did not want to change their celebrated writ of *habeas corpus* into a colourless order in the nature of *habeas corpus*.

Thus in order to collect the heritages of our Indian legal history imbedded in the development of the prerogative writs and the statutory substitutes of some of them and not to lose the benefits of developments in England the country of their origin it was necessary for our Constitution Makers to use very comprehensive expressions. The result was the use of all the words orders directions and writs² including writs in the nature of *habeas corpus* etc.

This is apart from the profound change in the procedure by which all applications for those extra-ordinary legal remedies known in England as High Prerogative writs were made in India by mere private actions in the name of the applicant.³

It may be stated that even the mere use of the word orders would comprehend in its ambit orders made under section 45 of the Specific Relief Act of India. But if Article 226 had merely stated that the State High Courts would have power to issue directions writs or orders in the nature of *habeas corpus* etc. there would certainly have arisen a doubt whether the advance made by the Indian Law under section 45 of the Specific Relief Act would have come within it. The developments reached in India under section 43 of the Specific Relief Act 1877 from the position obtaining for the English writ or order in nature of *mandamus* at the time

1 By the Administration of Justice Miscellaneous Provisions Act 1933 section 7

2 Cf footnote 6 on page 163 ante

of the Constitution were firstly that orders under section 45 could be negative—not to do a specific act¹—and secondly that orders against public authorities not to proceed in a specific manner on the ground of the voidness of the very law under which the authority was functioning², could be given

There was also another reason for making the groups of words 'directions, orders or writs' clearly larger than writs "in the nature of" *habeas corpus*, etc. "In England there is a definite meaning for expressions like 'orders in the nature of *mandamus*'³ and 'orders in the nature of *certiorari*'⁴. There, these expressions respectively meant power to compel a public authority to do a specific act conferred on the High Court under a statute and similar statutory power given to the High Court to call and quash records of inferior tribunals, *apart from the common law power inherent in the High Court*. In India the statutory powers in the High Courts to *mandamus* Income-tax Appellate Tribunal under section 66 (2) of the Indian Income tax Act is a well known example. Therefore if only the words "writs in the nature of *habeas corpus*" etc., were used there might have arisen a ground for a contention that only such statutory *mandamus* and *certiorari* were intended to be comprehended under Article 226

Thus cogent reasons could be found for the use of each of the words actually used in Article 226. The historical and comparative jurisprudence of these remedies gives the proper explanation to the language used in the Article. It is very interesting to reflect on the probability of our Constitution Makers anticipating an interpretation of the wording of Articles 32 and 226, which they so carefully chose to garner the benefit of experience that existed up to date under the various parallel positions obtaining in the common law world including India, to assume a power in the Courts appellate in nature and unbounded in scope. It was perhaps the fear of such an interpretation that prompted the draftsmen of the Burmese Constitution to use only the words 'directions in the nature of' *habeas corpus*, etc., in the Article corresponding to Article 32 of the Indian Constitution. The observation of the Supreme Court in *Veerappa Pillai v Raman & Raman, Ltd*⁵, that the Madras High Court in not contenting itself with merely quashing the proceedings of the Transport Authorities under the Motor Vehicles Act but going further and giving detailed directions to the Regional Transport Authority, Tanjore, as to the grant of bus permits went "clearly" in excess of its powers and jurisdiction⁶,

1 This negative *mandamus* was what was granted in *Ramesh Thaggar v State of Madras*, (1950) S.C.J. 418 (1950) S.C.R. 594 (1950) 2 M.L.J. 390 (S.C.) and *Brijbushan v State of Delhi*, (1950) S.C.J. 425 (1950) S.C.R. 605 (1950) 2 M.L.J. 431 (S.C.). In these cases orders which were of an obviously administrative nature were quashed by the Supreme Court on petitions which purported to be petitions for *certiorari* and *prohibition*.

2 *Charanjit Lal v Union of India* (1951) S.C.J. 29 1950 S.C.R. 869 at p. 46 per Mukherjea, J., *Western Indian Automobile Association v Province of Bombay*, (1948) 51 Bom.L.R. 58, I.L.R. (1949) B. 591, on appeal to Federal Court, 51 Bom.L.R. 894 (F.C.) 1949 F.C.R. 321 I.L.R. (1949) Bom. 686 1949 F.L.J. 154 *Halliers & Co v Nagesh Chandra Chakrabarti* (1949) 52 Bom.L.R. 23 (F.C.) 1949 F.L.J. 358, 1949 F.C.R. 356 *Suryaprakash Weaving Factory v Industrial Court Bombay* (1949) 52 Bom.L.R. at 57 58 I.L.R. (1950) B. 593

3 9 Halsbury's Laws of England (Hailsham) p. 776, para. 1311

4 *Ibid* at p. 839 para. 1421. For the difference between the two *cf. ibid* at p. 863 last but one paragraph in the text and foot note 'r' on that page

5 (1952) S.C.J. 261 at 269 (1952) S.C.R. 583 (1952) 1 M.L.J. 806 (S.C.)

6 Even though this decision was distinguished by a later Madras case, *C.S.S. Motor Service, Trkasi & others v State of Madras* (1952) 2 M.L.J. 894 A.I.R. 1953 Mad. 279 on the basis that it represented pre-Constitution law the judgment of the Supreme Court about the powers of the High Court under Article 226 of the Constitution represents obviously the post-Constitution law

shows that in their Lordships' opinion Article 226 did not intend to confer on the State judiciary any type of powers against public authorities which could not have been exercised by the Indian High Courts under section 45 of the Specific Relief Act or by the King's Bench in England ¹

III

In a consideration of the scope of the remedies under Article 226 it is necessary to discuss whether these remedies are capable of legislative exclusion. All the High Courts which had occasion to consider this matter have expressed the opinion that the Article being a constitutional provision is beyond exclusion or restriction by any municipal legislation² a view now confirmed by the Supreme Court

But there are certain observations in some judgments and some considerations which appear to put up a case for the view that Article 226 is capable of legislative regulation. It is therefore felt that a theoretical consideration of the Supreme Court judgment is not out of place. It was the considered view of Kaul, C.J., of the Madhya Bharat High Court that Article 226 did not empower the High Courts to grant the reliefs mentioned therein without further legislative grant. According to Kaul, C.J., 'jurisdiction is treated in Article 225 while only power is mentioned in Article 226 and in the absence of a clause like clause (1) of Article 32 or clause (1) of Article 227, Article 226 is not auto active to confer jurisdiction on the High Courts to issue these extra ordinary legal remedies'. Chakravarti, C.J. of the Calcutta High Court has observed that Article 225 speaks of the totality of all jurisdictions conferred on the High Court because the opening words "subject to the other provisions of this Constitution" in Article 225 are enough to rope in the other Articles in the Constitution like Articles 226, 227 and 228 which confer jurisdiction on the State High Courts ³. A further development of this argument would amount to this. The correct interpretation of Article 225 is to take the first two conditions in it as disjunctive. Thus when it is stated that subject to the other provisions of the Constitution the jurisdiction of the existing High Courts are confirmed the jurisdiction given under Article 226 is also included by reference. That total jurisdiction of the High Court is subject to the other condition, namely the provisions of any law enacted by virtue of powers conferred upon that legislature by the provisions of the Constitution. So the jurisdiction under Article 226 also is subject to the second condition mentioned in Article 225. The view that the total jurisdiction of High Courts is subject to legislative control can draw support from the analogous provisions of the previous Government of India Act⁴

1 Except of course the power to issue the remedies under the article against the government in appropriate cases which is expressly mentioned there

2 *Anand Engineering Co v Achru Ram* AIR 1951 All 749 at 768 F.B. Mallick C.J. *Elbridge v R K Das* AIR 1951 Cal 430 433 per Das Gupta J reversed on appeal on other grounds in AIR 1952 Cal 601. In this case Article 225 was extracted and commented upon by the learned Judge. *Sayradak Khatoon v State of Bihar* AIR 1951 Pat 434 436 DB. *Puho v State of Madras* 1953 1 M.L.J. 83 AIR (1953) Mad 392 at 394. *Sethu Raja v Board of Revenue* (1953) 2 M.L.J. 644 AIR 1953 Mad 972 at 973 74

3 Cf. Judgment of Kaul C.J. in *Anant Bhaskar v State of Madhya Bharat* AIR 1950 M.L. 60 at 67 and *Jayabhan v Regional Transport Authority* AIR 1951 M.B. 121 129-34

4 *Budge Budge Municipality v Mongra M.C.* AIR 1953 Cal 433 at 438 para 19. The Article 2-3, of course, applies only to High Courts in Part A States. But by virtue of Article 226 it applies to Part B States and under Article 241 to Part C States

5 Section 9 of the High Courts Act 1861 (24 and 25 Vict. C. 103) and clause 44 of the Letters Patent issued pursuant to that section dated 28th December 1865. Even though the proviso to section 22 of the Indian Councils Act 1861 (24 and 25 Vict. C. 67) made a great difference in

and internal evidence available from other provisions of the Constitution. For example Article 231 (c) read with (b) makes it clear that a State Legislature has competence to legislate regarding the jurisdiction of the High Court which is functioning on its soil. Further, if Article 226 is beyond the reach of legislatures while Article 225 is within such reach the result would be that the High Courts can be excluded from entertaining a suit on a subject matter which might be taken off from the High Court and given over to some special tribunal while its jurisdiction to hear a petition under Article 226 attacking a decision of the newly appointed tribunal cannot be taken away. This amounts to a permission to exclude the larger jurisdiction and a prohibition to take away the lesser. Again, the legislative entries—No. 95 in List I, 65 in List II and 46 in List III—are clear indications that the jurisdiction of High Courts can be controlled by Union and State Legislatures.¹ In Australia the State Legislatures have got more powers regarding the jurisdiction of State Supreme Courts than the National Parliament has over the High Courts.²

The reply to these arguments, apart from the sheer weight of judicial decisions against it, appears to be as follows. A plain reading of the Articles in the Constitution about the jurisdiction and powers of State High Courts shows that as far as possible each Article is made self-contained. The more natural interpretation of Article 225 is that subjection to the provisions of the Constitution and the further subjection to the provision of competent legislation is confined to the jurisdiction which is confirmed by that Article, namely, the jurisdiction which existed on the eve of the coming into force of the Constitution. Therefore the jurisdiction conferred by Article 226 is independent of Article 225 and beyond control by Union and State Legislatures. The argument that the effect of this view is to empower Parliament and State Legislatures to prohibit suits but not applications under Article 226 does not affect the matter. By keeping Articles 226 and 227 above the control of ordinary legislation the Constitution obviously wanted the superintending power of each State High Court fully protected from legislative exclusion. A special tribunal can be created by the appropriate Legislature and to that extent the jurisdiction of the High Court may be depleted as regards that subject-matter. Thus, the Law of Landlord and Tenant which was under the ordinary Courts has now almost gone into the hands of special statutory administrative tribunals. The Law of Master and Servant is another example. Under the present Constitution also the deprivation of the ordinary Courts of their jurisdiction over such subject matter is permissible because the general jurisdiction conferred on the High Courts

the plenitude of the power of legislation to affect the jurisdiction of High Courts given under the above provisions that fact does not affect the present argument. Section 106 (1) of the Government of India Act, 1915 only confirmed the jurisdiction previously granted by Letters Patent. Section 223 of the Government of India Act, 1935 and items 53 in List I, 2 in List II and 15 in List III and the legislative practice under that Act to freely exclude Court interference in the decisions of administrative tribunals and authorities are well known. Legislative history of particular provisions of the Constitution is relied on by the Supreme Court. Cf. *Shamdasani v. Central Bank of India*, (1952) S.C.R. 391 (1952) 1 M.L.J. 423 (1952) S.C.J. 29 at 31 (S.C.).

1. For instance Kaul, C.J., in *Dayabhai v. Regional Transport Authority*, AIR 1951 M.B. 121 at 133 stated apparently about the power under Article 226 thus: "This is of course subject to the other provisions of the Constitution and to the provisions of any law of the appropriate legislature by virtue of powers conferred on that legislature by the Constitution."

2. *Morgan v. Rylands Bros. (Aust.) Ltd.*, 1927 39 C.L.R. 517, *McGrath v. Goldsbrough Mort & Co., Ltd.*, (1932) 47 C.L.R. 121.

under Article 225 is subject to control by ordinary legislation. But after the Constitution, because of the existence of Article 226, the High Court will have power to prevent excess, absence and abuse of jurisdiction and patent errors of law of these tribunals. There is justification for protecting this beneficial jurisdiction from ordinary legislation. And this view does not make the legislative entries otiose, because the large majority of legislation would affect the general jurisdiction of the High Courts and in order to do that these entries as well as the present provision in Article 225 giving power to the appropriate Legislature were essential. Further, if Article 226, is kept above legislative restrictions the awkward situations arising in Anglo-American legal systems, from the judicial nullification of legislative exclusion of extra-ordinary legal remedies will be avoided once and for all.¹ Finally, looking at the trinity of Articles—Articles 225, 226 and 227—it will appear that Article 226 has more affinity to Article 227 than to Article 225. Perhaps the better arrangement would have been to make Article 226, clause (2) of Article 227 and then to have exempted that clause from the exemption clause (4) of that Article.² If that was done the possibility of the argument that Article 226 needed further legislation in order to make the High Courts competent to grant those remedies could have been avoided.

The powers under Article 226 are restricted in some ways by the Constitution. Article 320 (b) contemplates a limitation on the right of High Courts to grant relief under Article 226.³ Similarly exclusions of the jurisdiction of Courts implied under Article 31 (6) is valid and effectively prevents the issue of relief under Article 226.⁴ Article 212 bars remedies under Article 226 against the 'speaker of the Legislature'. Article 367 of the Constitution bars relief against Governor in regard to nominees to Legislative Council.⁵ Finally

1 Cf. Schwenz: Law and the Executive in Britain 1949 pp 163 to 198 the conclusion on p 198

2 Das: Administrative Law 1951 p 832

3 Bora Laskin: *Criticism to Labour Boards* The Apparent Failure of Privative Clauses 1952 30 Can Bar Rev. 686 and the literature to which reference is made in footnote 9 of that paper

4 In fact one is not sure of the exact intention of adding clause 4 to Article 227 without adding a similar clause to Article 226. If it was only to prevent the High Courts from calling returns from military tribunals or from prescribing forms in which books, entries and account, are to be kept by military tribunals it could have been so specifically provided without destroying the general judicial superintendence. But it is strange that when England and America are attempting to give more and more protection to the soldier from the vicissitudes of military justice India should exclude him by the fundamental law from Articles 32, 136 and 226. However whether by accident or design the soldier has still access to High Courts under Article 226.

5 *Ponnuswami v. Returning Officer Namakkal* 1952 S.C.R. 218 1952 1 M.L.J. 713 1952 S.C.J. 100 at p. 111. But the limits of this exclusion are pointed out in *Sartar v. Returning Officer Kolda District* A.I.R. 1952 Bom 277, *Yusufali Farar v. Returning Officer for the Constituency of Barwan Farwan* A.I.R. 1953 Cal 98 at 102 *Jagdish Chandra v. Prakash Narain* A.I.R. 1953 V.P. 31, 23 para 10 in *Shankar Rao v. State of Madras* A.I.R. 1952 M.B. 97 the question was left open in *Dr. Jyoti Mal v. Fakhruddin S.A.* A.I.R. 1952 T.C. 1 suggestion to amend the law was made at p. 4 para 14. In *Atmaditya Nandlal Sarda* A.I.R. 1953 Pat 293 is a recent decision on the subject.

6 *Law v. Chandra Sate of Madras* A.I.R. 1952 Mad 83, 1952 1 M.L.J. 456

7 *Shankar Lal Sahasr v. Speaker Orissa Legislative Assembly* A.I.R. 1952 Ori 234. But Cf. *Thakuranna v. Speaker T.C. Assembly* A.I.R. 1952 T.C. 166 for a case where mandamus was issued against the speaker an Art. 212 was held inapplicable.

8 *Bhaur Chand v. Gov. of West Bengal and others* A.I.R. 1952 Cal 709. But the view of Bose J. in paragraph 15 of his judgment that nomination under Article 171 (3) (c) read with clause 5 would preclude a writ application against nominated persons themselves is against principle and authority. It is against principle because no person can be a member of the Council of State who has not the qualifications laid down by Article 173 and if a gubernatorial notification gives complete protection the Governor can violate the Constitution and appoint an alien or a minor. It is against authority because *Re v. Speyer* L.R. (1916) 1 K.B. 593 established the right of a *bona fide* citizen to question the nominee of the King himself to the Privy Council a decision held in great respect in all Commonwealth countries. In fact there was a congestion of legal genius arrived in that case.

by any law made by Parliament, under Article 33 regarding members of the Armed Forces or the forces charged with the maintenance of public order, decisions of military and other tribunals are to some extent excluded from the jurisdiction of Article 32 such exclusion may be valid¹. But it is doubtful whether Article 226 can be controlled.

Besides the specific constitutional limitations above referred to, cases like *V G Row v The State of Madras*² *Ratna Sabhapathi Rao v State of Madras* and another³ suggest that political questions may arise for administrative determination which are not fit for judicial review. Similarly 'acts of state' properly so called will be beyond High Court's power under Article 226.

These reflections are sufficient to show that the powers given to the judiciary under our Constitution especially under Articles 32 and 226 are not as uncontrolled and uncontrollable as might appear at first sight.

IV

There are some obvious differences in the power of the Supreme Court under Article 32 with those of the State High Courts under Article 226. The reliefs under the former are guaranteed as fundamental rights, there is no enumeration of the persons or authorities against which it can be granted and no territorial limits are mentioned to contain that power. Even though Article 13 (1) and (2) declares void any law passed by the State in contravention of the rights guaranteed by that Part in which Article 32 is also included. Article 32 (4) states that "the right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution". The 'suspension' of the remedies guaranteed by Article 32 has to take place under Article 359 which can happen only where a proclamation of emergency is in operation and needs no comment at this place except that it is problematic to what extent the suspension of these remedies will effect the effacement of the rights given by other Articles of Part III. Entry 77 of the Union list contains a power for Parliament to legislate on the 'constitution, organisation, jurisdiction and powers of the Supreme Court'. It is ultimately for the Supreme Court to decide whether in order to reconcile Entry 77 with Article 32 it is necessary to assume that Parliament has competence to restrict the rights under Article 32 short of their suspension or abolition. The absence of the power to give relief regarding the rights which are not fundamental⁴ can be remedied by Parliament under Article 139 and the power to grant Special leave to appeal given to the Supreme Court under Article 136 is certainly intended to give succour to persons who will otherwise suffer injustice. The absence in Article 32 of the words 'any person or authority including in appropriate cases any Government within those territories' found in Article 226 is explicable. There is no need to mention any territorial jurisdiction in regard to the Supreme Court because its jurisdiction extends over the whole Republic. It is also unnecessary to enumerate the classes of public authorities against which Supreme Court can grant relief under that Article because that Article comes under Part III of

¹ Cf. in this connection Article 227 (4) of the Constitution also.

² (1953) 2 M.L.J. 413 1 L.R. (1954) Mad 399 a question of issue of passport.

³ (1953) 1 M.L.J. 252 AIR 1953 Mad 510 Chandra Reddi J., red distribution of wards in a municipal ty. But even here there are grounds on which Courts can intervene. Cf. *Pushpam v State of Madras* (1953) 1 M.L.J. 88 AIR 1953 Mad 392.

⁴ As it is jurisdiction under Article 32, is available only for redress of fundamental right. *Coochin v Excise Commissioner, Ajmer* 1954 S.C.J. 246 AIR 1954 S.C. 220 (224) per Mahajan, C.J.

the Constitution which defines in Article 12 the word "state" to include every public authority within the territory or under the control of the Government of India

The only question which creates some difficulty in the interpretation of Article 32 is about the right to ask for any relief under Article 32 (2) against a private person. In other words, when Article 32 states that the right to move the *Supreme Court* by appropriate proceedings for the enforcement of the rights conferred by that Part is guaranteed, can a person whose right under Article 15 (2)¹ or 17² or 23 (1)³ or 24⁴ or 29 (2)⁵, is violated by another private individual, corporation or institution file a *petition* under Article 32 and get an order under Article 32 (2) against the violator not to continue such violation? Except these Articles there does not appear any Article which, on a right interpretation of the Constitution, can be violated by any one but the State. Regarding Articles 19 and 31 (1) the Supreme Court has stated in *Shamdasani v Central Bank of India*⁶, that those Articles were not intended to protect persons⁷ from injury at the hands of private individuals. If Article 32 (1) is literally construed there is basis for a view that unless the orders mentioned in clause (2) of that Article are available against private persons also an original suit under Article 32 has to be provided for. But the Rules made by the Supreme Court provide only for original petitions under Article 32. Therefore the Rules of Supreme Court are based on the view that under Article 32 the Constitution contemplated only original petitions. If that is so then there is ground for a plausible argument that on the violation of the abovementioned five Articles of Part III of the Constitution an aggrieved person can get a suitable mandate under Article 32 against private persons also and may be said that this is another explanation why the wording of Article 32 is expressly made wider than the issuing of writs in the nature of English prerogative writs. But the entire argument appears to be built upon a misconception regarding the object of Articles 32 and 226. The remedies under Articles 32 and 226 are remedies of public law and they are not intended for private persons or institutions. In the case of injuries inflicted by private parties an ordinary suit in the lowest Court is available and is sufficient. In such cases proceedings in the Supreme Court will be inappropriate. The persuasive judgment of the Patna High Court⁸ makes this matter clear.

Where the writs and orders mentioned in Articles 32 and 226 are prayed for against public authorities it is suggested that the rules that will be recognised by the Supreme Court and the High Courts will be uniform. Broadly speaking, rules regarding the personal interest of the applicants for those remedies, equitable

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- 1 Discrimination on grounds of religion race caste sex or place of birth is prohibited
 - 2 Untouchability is abolished and its enforcement is declared an offence
 - 3 Traffic in human beings and all forms of forced labour are prohibited and contravention of this prohibition is declared an offence
 - 4 Employment of children below the age of fourteen in a factory mine or hazardous work is prohibited
 - 5 Denial of admission into any state or state aided educational institution on the ground of religion race caste or language is prohibited
 - 6 1952 S C J 29 1952 S C R 391 (1952) 1 M L J 423 (S C)
 - 7 Article 19 is limited to citizens
 - 8 In *Jamulpur Arya Samaj v Dr D Ram and others*, A I R 1954 Pat 297

considerations like undue delay amounting to laches, unclean hands, failure to exhaust administrative remedies, the availability of adequate alternative relief will all have to be taken into consideration before any remedy under these Articles can be actually issued. But provided an applicant is successful in surmounting the hurdles mentioned above, then in the actual *framing* of the orders the judiciary will have a free hand. Any direction issued under these Articles will not enable the High Courts and the Supreme Court themselves to *usurp the jurisdictions* given by Legislatures to administrative tribunals or encroach on the discretions conferred on public authorities. The jurisdiction under Articles 32 and 226 will remain an *administrative jurisdiction* as it is known in the common law world.

V

The ideal envisaged above will certainly take some time for realisation. But none can find fault with the existing constitutional provisions if that is not realised.

None of the active participants who drafted our Constitution had been appointed to interpret it as it happened in countries like United States and Australia.

The existing difference in the approach of different Judges of the country to Articles 32 and 226 is not a calamity at all. It is the pragmatic case-to-case solution which will ultimately fit the law to the genius of the nation rather than the amendments which will, in any case, be more sudden in its nature than the gradual adjustment of the people to developing judicial interpretation of the provisions of the Constitution.

When sufficient time is allowed to Indian judiciary to work out the administrative jurisdiction conferred by the Constitution it is suggested that it will be found that no startling provisions were inserted by the Constitution. The major change that was effected was the removal of the disabilities that previously existed in this sphere on the jurisdiction of our judiciary.

Therefore what is urgent is as much academic discussion on Articles 32 and 226 as possible. It is only by discussion that the difficult questions mooted in this paper can be properly solved. And it is very necessary that those problems are solved with care. That is the only way to keep the weapons of judicial control ready and the Courts courageous to use them. Here, as elsewhere, knowledge is power and ignorance creates doubt and doubt, hesitation in action.

There appears to be a certain amount of inferiority complex in certain political quarters of the country about our Constitution. This is apparently because of certain adverse reflections made upon our Constitution by foreign constitutional lawyers and not because sufficient time has passed to convince the country that the existing provisions have failed. The haste to effect considerable amendments in our Constitution may be ill-advised.¹

The proposed amendment to Article 226 to the effect that the remedies provided by that Article are to be limited to the enforcement of fundamental rights alone, and even there only when the public interest requires their issue or there will be a failure of justice needs careful thought. The same source which proposes the above amendment wants the fundamental rights to be so amended that the Courts will be deprived of power to question the reasonableness of the compensa-

¹ For instance what is a source of difficulty to such a jurist like Sir Ivor Jennings is a common place of Indian legal procedure. Cf. *Jennings Some Characteristics of the Indian Constitution*, 1953, pp. 39-40. Consult footnote 6 in page 163, *note* in this paper.

tion decided by the administration for the compulsory acquisition of private property. Philosophers of history might note that in the decadence of all great peoples it was an invariable concomitant that numerical majorities were placated by feeding and entertainment at public expense. So long as no effective substitute is found for self interest as an incentive to production legislation which contemplates the gift of land or money to the landless or penniless would only damp initiative of the industrious without any longstanding benefit to the receivers of such public charity. The purpose of depriving the Courts of power to adjudicate upon the reasonableness of compensation granted for the taking of private property is to enable the executive to take away private property on the payment of, or promise of payment of, token compensation meanwhile clamping a legal gag over the mouths of the dispossessed. The proposed amendments are based on the doubtful philosophy that, the penury of a part of the population is the consequence of the past iniquity of the other parts. People of great integrity and intelligence have believed that it is more probably the result of extravagance, laziness, or inferiority of talents on the parts of poor on the one hand and unplanned families on the other. However, world history has not shown that any country has achieved progress by free gifts to the poor. Communism cannot be liquidated if that is the object of the proposers of the present amendments by such wholesale gifts. Even in Russia the faith that the rule 'from everyone according to his ability to everyone according to his needs' is practicable had been destroyed by experience.

But if the proposed amendments are not based on the above mentioned doubtful philosophy it can only be the result of a blind belief not only in the integrity but also in the efficiency of the administration both of which are yet to be vindicated. Executive impatience of judicial control is an indication of inefficiency and a pricking conscience. If the democratic form of Government has to be preserved the invariable conditions are an effective opposition party in political arena and a fearless judiciary on the legal plain. A party which is impatient of the Courts would in truth be more impatient of the existence of the opposition and therefore a party which advocates the emasculation of the judiciary in relation to action of the administration cannot be believed when it pays lip service to democracy. The twin props which alone can support democracy are tolerance and patience and a political party that is impatient of the rule of law will be intolerant of the views of the opposition.

One is amused that only the opinion of the State Governments are solicited and not that of High Courts and Bar Councils Chambers of Commerce and Trade Unions. Asking the Executive what freedom the Judiciary ought to have to control them is like asking the fox how much freedom the dog should be given.

If the above proposed amendments are carried out any party provided it gets a temporary majority in the Legislature can turn this country into a collective farm without any legal obstacle. Personal liberty has already lost its sanctity by the Preventive Detention Act. The right of property would also become insecure by the proposed amendments. If the proposed amendments are carried out only the facade of the Constitution will remain.

As far as the proposed changes to Article 226 are concerned it is possible that a noble judiciary may yet frustrate the disclosed objects of the proposers. Every legal right can with a little ingenuity be brought into the fold of one or other of

the fundamental rights. It is also not an irrational view that the grant of quick relief whenever private rights are violated is itself in the public interest.

If the Constitution is not considered *sacrosanct* at least to the extent to save it from such questionable amendments and the attempt of a temporary majority to perpetuate its pet ideas of democratic philosophy and judicial function succeed by driving a coach and four into the newly born Constitution it would undoubtedly be a calamity. It is hoped that this will be prevented in good time.

On the other hand unless the hands of our judiciary are strengthened in the way suggested the evidence is that individuals will suffer injustice. The follies of administrators are apparently not on the decrease. The Assistant Advocate General of Kashmir is not alone in the belief that the Government is the fountain head of all powers.¹ Custodian General of Evacuee Property did not know the date on which the Act he had to administer came into force.² The Government dispossessed an owner by military force.³ The Customs authorities first collected taxes by wrongly interpreting the Customs Act and then by wrongly calculating the amount of customs duty.⁴ The Government exercised its powers of nomination under the Municipal Act in favour of a person who stood and was defeated in the next previous election when the nomination of such a person was expressly prohibited by law and forced the Allahabad High Court to issue the first *quo warranto* in India.⁵ The Government took forcible possession of a citizen's business,⁶ bringing down upon itself a mandamus. A University after admitting students to a particular course did not provide facilities for practical training.⁷ The Bombay Government began the questionable practice of allocating "suppressed vacancies" to the informants which the High Court had to prevent.⁸ When the Civil Court restrained a party by an injunction from entering a property Government requisitioned that property under Public Safety Measures Act and gave it to that very party.⁹ The Industrial Tribunal malleted a person in costs who was not even a party to the proceeding in which it was ordered.¹⁰ Three District Collectors who were the Presidents of the Ex Servicemen's Co-operative Societies in their respective districts and the Chairmen of the tribunals for the issue of licences to buses in those districts granted permits to the societies though there were many other applicants.¹¹

It is not necessary to multiply examples of high handed or worse, careless administrative action which either actually produced injustice or gave a great

1. *Ghulam Nabi v State* AIR 1954 J & K 7 at p 9

2. *Mohammad Hussain v J K Trusts and another* AIR 1952 Bom 453

3. *Hira Singh Bam v The State of Himachal Pradesh and another* AIR 1953 Him Pra 57, *Dhanu Singh v Sub Divisional Magistrate Khirna* AIR 1953 Raj 202

4. *Afghan Commercial Co (Ind) Ltd v Union of India* AIR 1953 Punj 225

5. *Maheshkullah v Iftadal Rehman* AIR 1953 All 193. The present writer has not been able to notice any earlier precedent.

6. *Surajmal v Rajasthan State* AIR 1953 Raj 73. Wanchoo CJ and Bapna J.

7. *Triloku Nath Garg v The University of Allahabad* AIR 1953 All 224

8. *Chacko v Government of Travancore-Cochin* AIR 1951 TC 221

9. *United Commercial Bank v Kartar Singh Chauraman Central Government Industrial Tribunal* Calcutta AIR 1953 Cal 37

10. *Magapalam Co-operative Motor Transport v Bangaru Rayu*, (1953) 1 MLJ 533 1 LR (1954) Mad 36 AIR 1953 Mad 709. For an instance of extensive injustice perpetrated under an Intensive Procurement Order consult *Khagendra Nath v Junior Assessor* AIR 1953 Cal 719

suspicion of unfair preference¹ In all the above cases except one² the Courts were able to remedy the evils under Article 226 of the Constitution. So long as we have not fashioned a more ideal system to control administration our only safeguard on the remedial plan lies in the preservation of the administrative jurisdiction of Indian judiciary without blemish

SUPPLEMENT.

Supreme Court Sitting *

New Delhi, the 10th July, 1954

No F. 23 (1)/54-SCJ.—In exercise of the powers conferred on him by Article 130 of the Constitution, the Chief Justice of India, with the approval of the President, hereby appoints Srinagar as the place at which a Division Bench of the Supreme Court may sit for the disposal of appeals and other proceedings transferred to it from the Board of Judicial Advisers, Jammu and Kashmir under clause (1) of Article 374 of the Constitution

Amendments to the Supreme Court Rules, 1950 *

No. F. 23 (a)/54-SCJ.—The following is published for general information —

The Supreme Court of India in the exercise of its rule making powers, and with the approval of the President, hereby makes the following amendments to the Supreme Court Rules 1950 —

Add the following at the end of Order XLVII, Part XI —

'ORDER XLVIII

Appeals and other proceedings transferred under clause (4) of Article 374 of the Constitution

1 Notwithstanding anything contained in the preceding Orders, the rules contained in this Order shall apply to all appeals and other proceedings which stand transferred to the Supreme Court from the Advisory Board, Jammu and Kashmir under clause (4) of Article 374 and which are heard at Srinagar

2 (1) The Chief Justice may from time to time nominate two or more Judges to constitute a Division Bench to perform the duties assigned by these rules to a Division Bench and nominate one of the Judges of the Court sitting at Srinagar to perform the duties assigned to a single Judge or a Chamber Judge under these Rules

(2) The sittings of the Division Bench and of the single Judge and a Chamber Judge shall be held at Srinagar as the Chief Justice may from time to time direct

3 A single Judge sitting in Court shall have power to dispose of all pending applications, and a Judge in Chambers may deal with all interlocutory applications

Provided that any such single Judge or a Judge in Chambers may in his discretion refer any particular matter to the Division Court

4 Notwithstanding any orders previously made in the course of the proceedings before the Advisory Board Jammu and Kashmir every appeal pending before the Court sitting at Srinagar shall be heard by a Division Bench consisting of not less than two Judges

5 The Court sitting at Srinagar shall have power to direct the hearing of any particular appeal or proceeding before it by the Court sitting at Delhi and in the event of such a direction being given, the rules contained in the preceding Orders shall be applicable to such proceedings in their further stages, to the exclusion of the provisions in this Order

6 Notwithstanding anything contained in these Rules, including those in this Order the Court sitting at Srinagar shall have the power to give such directions and make such orders in procedural matters or otherwise as may be necessary for the ends of Justice or to prevent abuse of the process of the Court, in respect of the appeals and proceedings dealt with by it at Srinagar

1 *Brindavan Chandra v. State of Orissa* AIR 1953 Orissa 121 is a leading case on judicial control of official discretion where the Government are smacked of political victimisation Cf *id* at p 144 *Lala Prasad v. Inspector-General of Police* AIR 1954 All 439 is a noteworthy case

2 *Chako v. Government of Travancore-Cochin* AIR 1951 T.C. 221 In this case a previous auction holder of handukrishna land refused to hand over possession to the highest bidder at a subsequent auction When the new auction purchaser attempted to disturb the possession of the old, the latter obtained an *ex parte* injunction against the obstructor from the Civil Court Thereupon the Government appeared on the scene requested the land under the Travancore Public Safety Measures Act section 4 and entrusted the land to the very same person against whom the Civil Court had given the injunction Though the Government might have reasons to requisition the property and though technically they were not parties to the injunction the spectacle of an injunction of a Civil Court being unceremoniously set aside by high level executive action is not conducive to the fostering in the people a sense of obedience to the law

* Published in the *Gazette of India, Extraordinary, Part I, Sec 1, page 813, dated 10th July, 1954*

7 The Court sitting at Srinagar may permit the use of Urdu language to such extent as it thinks fit in respect of the proceedings or appeals pending before it

Provided that the Judgments delivered, Decrees passed or Orders made by it shall be in the English language

8 The duties assigned to and the powers exercisable by the Registrar under the Rules of the Supreme Court shall respectively be discharged and exercised in respect of all proceedings before the Court sitting at Srinagar by the Deputy Registrar at Srinagar

9 The Deputy Registrar shall be the Taxing Officer of the Court sitting at Srinagar, and in the Taxation of costs he shall generally be guided by the practice followed by the Advisory Board of Jammu and Kashmir at Srinagar unless the Court in disposing of a matter has ordered the payment of a lump sum for costs

10 Appeals and applications pending before the Court sitting at Srinagar may be proceeded with at Srinagar either by the party in person or, subject to the next succeeding rule, by a legal practitioner

The engagement of an Advocate on record is dispensed with, a Senior Advocate may appear and plead without a Junior in respect of all such matters heard at Srinagar

11 The following classes of legal practitioners will be entitled to act or appear and plead before the Court sitting at Srinagar —

(a) Advocates who have been duly enrolled as Senior or other Advocates of the Supreme Court,

(b) In Criminal matters legal practitioners who filed in the Registry of the Advisory Board, Srinagar, their Vakalatnama before the 14th May 1954,

(c) Legal practitioners of the High Court at Srinagar of not less than 10 years' standing who are specially permitted to do so by the Court sitting at Srinagar on payment of Rs 50

12 It will not be obligatory for the parties to lodge in the said pending appeals a statement of the case as provided in rule 2 of Order XVIII Part II of these rules

13 In those civil or criminal cases in which the record has not so far been printed, printing will be dispensed with."

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT —MEHR CHAND MAHAJAN *Chief Justice*, S R DAS, N H BHAGWATI, B JAGANNADHAS AND T L VENKATARAMA AYYAR, JJ*Criminal Appeal No 9 of 1952*

Ronald Wood Mathams

*Appellant**

v

State of West Bengal

*Respondent**Criminal Appeal No 13 of 1952*

Sudhir Kumar Dutt

Appellant

v

The State

*Respondent**Criminal Appeal No 14 of 1952*

Jiban Krishna Bose

Appellant

v

The State

*Respondent**Criminal Appeal No 15 of 1952*P C Ghose *alias* Probodhu Chandra Ghose*Appellant*

v

The State of West Bengal

*Respondent**Criminal Procedure Code 1 of 1898 sect on 23 Requirements of—Non-compliance with—Effect*

The complaint was instituted on 11th June 1945. The examination of the witnesses on the side of the prosecution commenced on 6th September 1945 and it was concluded after undergoing several adjournments on 29th March 1946. On 27th March 1946 the accused persons filed a list of 15 witnesses to be examined for the defence. On this an order was passed on 29th March 1946 in the absence of the accused and their lawyers that summons might issue for 8th April 1946 reserving the decision on the question whether the witnesses were necessary for that date. Summons were not sent in the manner prescribed by sections 63 and 69 of the Criminal Procedure Code but by ordinary post. When the case was taken up on 8th April 1946 it was found that two of the envelopes had been returned from the Dead Letter Office and as for the rest there was nothing to show what had happened. In this situation the Tribunal passed an order that no further process would issue and the case was then decided on the evidence on record and the accused convicted on the charge of bribery.

On ultimate appeal to the Federal Court the objection of the accused that the procedure adopted by the Tribunal was in contravention of section 237 of the Criminal Procedure Code and amounted to a serious irregularity was upheld. In upholding this objection the Court observed that section 57 was imperative in its terms that process would not be refused except for the reasons mentioned therein that no such reasons existed and that the order of the Tribunal dated 8th April 1946 refusing to issue process was accordingly illegal. This judgment was passed on 23rd April 1948. When the matter went back to the High Court of Calcutta an order was passed by that Court on 2nd August 1948 adjourning the hearing of the appeal till disposal of an appeal to the Privy Council by another accused. Then came the Independence Act of India and the appeal to the Privy Council was transferred to the Federal Court, for disposal. As information concerning the exact position of that appeal was for some time lacking and as the prospect of that appeal being heard appeared distant the High Court passed an order on 9th April, 1951 that the remanded appeals would be taken up for hearing on 11th June 1951 and that the accused should take the necessary steps for examination of the witnesses mentioned in the list, dated 27th March 1946 and that the office should take steps to secure the attendance of those witnesses except one who was in East Pakistan. The list was accordingly filed on 8th May 1951. Therein it was stated that out of the 15 persons whose names were mentioned in the list dated 27th March 1946 it was possible to get the address of only six persons and that as for the rest it was not possible

to trace their whereabouts, as they had mostly migrated to Asansol at the time when the works were being executed and had since left that place. Out of the six persons whose addresses were given two were served and examined in Court, a third witness was given up. The fourth had migrated to East Pakistan and no process could be issued against him. Another witness had died in hospital. As regards the sixth witness, the endorsement on the summons was that he had left the place and that it was not known to which place he had gone. The Judges who heard the appeal on remand held by their judgment, dated 6th September 1951, that on the evidence both the charges of conspiracy and bribery had been established, and convicted the accused under the appropriate sections. On appeal to the Supreme Court,

Held The trial of the accused had in the circumstances been vitiated by reason of the fact that they had no reasonable opportunity to examine their witnesses and their convictions were accordingly bad.

It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them.

Appeal on transfer after grant of Special Leave by Privy Council on the 13th November, 1947, from the Judgment and Order, dated the 14th July, 1947, of the High Court of Judicature at Calcutta in Criminal Appeal No 350 of 1946, and

Appeals under Article 134 (1) (c) of the Constitution of India from the Judgment and Order dated the 6th September, 1951, of the High Court of Judicature at Calcutta in Criminal Appeals Nos 340, 341 and 351 of 1946 and Government Appeal No 19 of 1946

N C Chakravarty, A K Mukherjee and Sukumar Ghose, Advocates for Appellant in Cr A No 9

A K Basu, Senior Advocate, (*Ganpat Rai*, Advocate, with him) for Appellant in Cr A No 13

A K Dutt and Ganpat Rai, Advocates for Appellant in Cr A No 14

Sukumar Ghose Advocate for Appellant in Cr A No 15

B Sen, A M Chatterji and P K Bose, Advocates for the Respondents in all the appeals

The Judgment of the Court was delivered by

Venkatarama Ayyar, J—These are appeals against the Judgments of the High Court of Calcutta convicting the appellants on charges of conspiracy to cheat the Government and of bribery. The facts so far as they are material, may be briefly stated. The appellant S K Dutt, carried on business as a building contractor under the name and style of British India Construction Company. This firm had a branch at Asansol which was, at the material dates, in charge of the appellant, J K Bose. In May, 1942, the military took up construction of dumps and roads in this area, and the appellant, R W Mathams, who was the Garrison Engineer at Asansol, was put in charge of it, and the appellant, P C Ghose, was functioning as overseer under him. On or about the 10th May, 1942, an order was placed with S K Dutt for the construction of dumps at a place called Burnpur near Asansol. The works were executed in June and July, 1942, and sums amounting to Rs 1,74,000 were paid to S K Dutt on account therefor. The case for the prosecution is that this amount was in excess of what was due to him for works actually done, by about Rs 56,000 and that with a view to avoid the refund of this excess, the appellants entered into a conspiracy, under which S K Dutt was to prefer a claim for construction of roads purported to have been carried out in execution of an order which R W Mathams was to issue, P C Ghose was to measure the road so claimed to have been constructed, and the bill was to be passed for an amount exceeding what had actually been paid. In accordance with this scheme, S K Dutt wrote Exhibit

19 on 28th January, 1943, claiming payment for "additional work within the store dump area", R. W. Mathams passed an order bearing date 7th July, 1942, (Exhibit 10), placing an order with S. K. Dutt for the construction of roads, P. C. Ghose prepared the final bill, Exhibit 6, for Rs. 1,89,458 14-0 on 15th March, 1943, and the same was passed by R. W. Mathams. It is stated for the prosecution that the road as alleged to have been constructed by the appellant, S. K. Dutt, were, in fact, constructed by the military, and that the order of R. W. Mathams bearing date 7th July, 1942, was, in fact, brought into existence sometime in March, 1943. It is further stated for the prosecution that as consideration for passing the above bill, a bribe of Rs. 30,000 was agreed to be paid to R. W. Mathams and to P. C. Ghose, that S. K. Dutt sent that amount by cheque to J. K. Bose on 16th March, 1943 and that on 17th March, 1943, R. W. Mathams was paid Rs. 18,000 and P. C. Ghose, Rs. 12,000 as illegal gratification. The appellants were accordingly charged with conspiracy to cheat the Government and bribery.

The appellants denied the conspiracy. They stated that the roads had, in fact, been constructed by S. K. Dutt. With reference to the cheque for Rs. 30,000, the case of S. K. Dutt and P. C. Ghose was that the amount was required for payment to sub-contractors who had constructed the roads under S. K. Dutt, and that it was, in fact, utilised for that purpose. They produced Exhibit 27 series, which are receipts purporting to have been signed by the several sub-contractors.

The Special Tribunal which tried the case, delivered its judgment on 9th May, 1946, acquitting the appellants on the charge of conspiracy but convicting them for the offence of bribery. Appeals against this judgment were taken to the High Court of Calcutta, by the appellants against their conviction on the charge of bribery and by the Government against the acquittal on the charge of conspiracy. By their judgment, dated 14th July, 1947 the learned Judges (Clough and Ellis, JJ) dismissed the appeals of the appellants, and allowed that of the Government. In the result the appellants stood convicted on the charges both of conspiracy and bribery.

R. W. Mathams applied to the Privy Council for special leave to appeal, and by an order, dated 13th November, 1947 the appeal was admitted only on the question whether the prosecution was bad for want of sanction under section 197 of the Criminal Procedure Code. The appellants, S. K. Dutt, J. K. Bose and P. C. Ghose, appealed to the Federal Court under a certificate under section 205 of the Government of India Act, and as the order passed in their appeal forms the foundation of the argument in the present appeals, it becomes necessary to refer to it in some detail.

One of the grounds argued by the appellants in the Federal Court was that the requirements of section 257 of the Criminal Procedure Code had not been complied with, and that there was accordingly no fair trial. The facts on which this objection was based are these. The complaint was instituted on 7th June, 1945. The examination of witnesses on the side of the prosecution commenced on 6th September, 1945 and it was concluded after undergoing several adjournments on 29th March, 1946. On 27th March, 1946, the appellant, J. K. Bose, filed a list of 15 witnesses to be examined for the defence. Most of them were persons who are alleged to have given the receipts, Exhibit 27 series, acknowledging payment of money for construction of works done by them. On this, an order was passed on 29th March, 1946, in the absence of the appellants and their lawyers, that

summons might issue for 8th April, 1946, reserving the decision on the question whether the witnesses were necessary, for that date. Summons was not sent in the manner prescribed by sections 68 and 69 of the Code but by ordinary post. When the case was taken up on 8th April, 1946, it was found that two of the envelopes had returned from the Dead Letter Office, and as to the rest, there was nothing to show what had happened to them. In this situation, the Tribunal passed an order that no further process would issue, and the case was then decided on the evidence on record, and the appellants convicted on the charge of bribery.

On these facts it was contended before the Federal Court that the procedure adopted by the Tribunal was in contravention of section 257 of the Code, and amounted to a serious irregularity. In upholding this objection, the Court observed that section 257 was imperative in its terms, that process could not be refused except for the reasons mentioned therein, that no such reasons existed, and that the order of the Tribunal, dated 8th April, 1946, refusing to issue process was accordingly illegal. It was further observed that the witnesses cited would be material, because their evidence, if accepted, would establish that Exhibit 27 series were genuine, and that this would militate against the case of the prosecution in respect of both the charges of conspiracy and bribery. The Court accordingly set aside the convictions, and directed that the appeal should be re-heard.

"after giving a reasonable opportunity to the appellant No. 2 (J. K. Bose) to take such steps as he may be entitled to take in law for enforcing the attendance of the witnesses mentioned in the list of the 27th March and after considering the evidence of such of these witnesses as may appear before the Court."

This Judgment was passed on 23rd April, 1948. When the matter went back to the High Court of Calcutta in pursuance of this Judgment, an order was passed by that Court on 2nd August, 1948, adjourning the hearing of the appeals till the disposal of the appeal of R. W. Mathams by the Privy Council. Then came the independence of India, and the appeal of R. W. Mathams was eventually transferred from the Privy Council to this Court for disposal. As information concerning the exact position of the appeal of R. W. Mathams was for some time lacking, and as the prospect of that appeal being heard appeared distant, the High Court passed an order on 9th April, 1951, that the remanded appeals would be taken up for hearing on 11th June, 1951, that the appellants should take the necessary steps for examination of the witnesses mentioned in the list, dated 27th March, 1946 and that the office should take steps to secure the attendance of those witnesses, except one who was in East Pakistan. The list was accordingly filed on 8th May, 1951. Therein, it was stated that out of the 15 persons whose names were mentioned in the list, dated 27th March, 1946, it was possible to get the address of only six persons, and that as for the rest, it was not possible to trace their whereabouts, as they had mostly migrated to Asansol at the time when the works were being executed and had since left that place. Out of the six persons whose addresses were given, B. C. Mukherjee and R. K. Paul, were served and examined in Court. A third witness was given up, as he was a handwriting expert. The fourth witness, Luakat Hossain, had migrated to East Pakistan, and no process could be issued against him. Another witness, Sanchar Mistry, had died in the hospital. As regards the sixth witness, Sashinath De, the endorsement on the summons was that he had left the place, and that it was not known to which place he had gone. The learned Judges who heard the appeal on remand held by their Judgment, dated 6th September, 1951, that on the

evidence both the charges of conspiracy and bribery had been established, and convicted the appellants, S K Dutt, J K Bose and P C Ghose, under the appropriate sections. The matter comes before us on special leave under a certificate of the High Court under Article 134 (c) of the Constitution.

The argument in support of these appeals is that the trial of the appellants had been vitiated by reason of the fact that they had no reasonable opportunity to examine their witnesses, and that their convictions were accordingly bad. We think that this complaint is well founded. By its Judgment, dated 23rd April, 1948, the Federal Court decided that the order of the Tribunal, dated 8th April, 1946, declining to issue process for the witnesses mentioned in the list, dated 27th March, 1946, was in contravention of section 257, Criminal Procedure Code, that the evidence of those witnesses would be material for refutation of the charges of both conspiracy and bribery, and that accordingly the appellants should be granted an opportunity to examine those witnesses. On this order, the only question that has to be decided is whether the appellants got such an opportunity when the appeal was re-heard in pursuance of the order of remand. The important point to be noted is that by reason of the order of the High Court, dated 2nd August 1948, the appeal was not taken up for hearing immediately as it ought to have been, and that it was only on 8th May 1951 that it was possible for the appellants to take steps in the matter. But by that time, the situation had undergone a radical change. In their application, the appellants stated that the whereabouts of most of the witnesses could not be traced and this is not to be wondered at. Burnpur, where the works had to be executed, is a petty township situated in a corner of the State, and it sprang into prominence only owing to military activities. Contractors and sub-contractors flocked to that place from all sides for executing the military works and there is nothing improbable in their having left the place when the situation changed, as it did on the conclusion of the war by the end of 1945. And there arose a further complication. In 1947, two Dominions came into being as a result of the Indian Independence Act, and there was a partition of Bengal. It is not unlikely that some of these contractors belonged to East Pakistan or had settled there.

That the list of witnesses given on 27th March, 1946, was not all fictitious is borne out by the fact that two of them actually gave evidence at the re-hearing and a third had died in the hospital. When some of the witnesses mentioned in the list are proved to be real persons, there are no materials on which it can be affirmed that the others are fictitious persons. Indeed, the evidence of the two witnesses, Mukherjee and Paul, is that they had seen some of those sub-contractors whose names appear in Exhibit 27 series, actually at work there. The learned Judges have rejected their evidence on the ground that they are not men of status, but on the question whether the appellants had made payments to the sub-contractors under Exhibit 27 series, the best evidence can only be of those persons. It may be that the two witnesses are not speaking the truth when they say that they saw the other persons mentioned in the list working on the roads, and it is possible that those persons are fictitious. But it is equally possible that they are real persons, whose whereabouts could not be traced in the exceptional circumstances which had intervened. As admittedly three of them are real, it would be unsafe to act on the view that the others must be fictitious, and if they are real persons who could not be examined for no fault of the appellants, grave injustice

would result in the accused being condemned without the evidence of these witnesses having been taken. For this situation, the appellants are not to blame. That was the result of the erroneous order passed by the Tribunal on 8th April, 1946, refusing to issue process and the Order of the High Court, dated 2nd August, 1948, adjourning the appeal, till the disposal of the appeal of R W Mathams.

In coming to the conclusion that the guilt of the appellants had been established, the learned Judges were greatly influenced by the correspondence relating to the passing of the bill, in particular the letter of S K Dutt, dated 23rd January, 1943 (Exhibit 18), by the long interval between the completion of the work which was in July, 1942 and the alleged payments under Exhibit 27 series which were after 17th March, 1943, and by various other circumstances, which probalised the case for the prosecution. It must be conceded that the evidence on record tends to establish a strong case against the appellants. But then, that is a case which they are entitled to rebut, and if, as was held by the Federal Court, Exhibit 27 series would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connected with those documents, has deprived the appellants of an opportunity of rebutting it. Whatever one may think of the merits of the appellants' contention, they cannot be convicted without an opportunity being given to them to present their evidence, and that having been denied to them, there has been no fair trial, and the conviction of the appellants, S K Dutt, J K Bose and P C Ghose, cannot stand. The result may be unfortunate. But it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. The appeals will be allowed, and the appellants acquitted.

Then there remains the appeal of R W Mathams. It has been already stated that by an Order, dated 13th November, 1947, the Privy Council gave him special leave to appeal, limited to the question whether the proceedings were bad for want of sanction under section 197 of the Criminal Procedure Code. By a further Order, dated 5th August, 1948, the Privy Council enlarged the scope of the appeal by permitting the appellant to raise the contention that there had been a contravention of section 257 of the Criminal Procedure Code. These are the two points that arise for determination in his appeal. The question whether sanction under section 197 was necessary for instituting proceedings against the appellant on charges of conspiracy and of bribery, is now concluded by the decisions of the Judicial Committee in *H H B Gill v The King*¹, and *Phanindra Chandra Neogy v The King*², and must be answered in the negative. The question whether there was contravention of section 257 of the Criminal Procedure Code and a denial of fair trial must, for the reasons already given, be answered in the affirmative, and the conviction of the appellant set aside on that ground. His appeal will also be allowed, and there will be an order of acquittal in his favour.

Appeals allowed

¹ (1948) 2 M.L.J. 6 L.R. 75 I.A. 41; ² (1949) 1 M.L.J. 177 L.R. 76 I.A. 10
L.R. (1948) 2 Cal. 541 (P.C.) (P.C.)

1 SUPREME COURT OF INDIA

[Criminal Appellate Jurisdiction]

PRESENT —B K MUKHERJEA, VIVIAN BOSE AND GHULAM HASAN, JJ

Aftab Ahmad Khan, son of Hakim Mohamad Yar Khan, condemned

prisoner, confined in District Jail, Secunderabad

Appellant*

v

The State of Hyderabad

Respondent

Criminal Procedure Code (V of 1898), sections 235 and 233—Respective scope—Criminal Trial—Judgment on appeal—Requirements—Sentence—Death penalty—Confirmation by third Judge on appeal on difference of opinion between the two Judges—Proper order to pass

Section 233, Criminal Procedure Code, embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a separate charge and every such charge should be tried separately. But the legislature has engrafted certain exceptions upon this rule in sections 234, 235, 236 and 239. Section 235 provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

Where the charge against the accused a Reserve Police Inspector of Hyderabad (before the Police Action) was that he went to a village with Razakars, took into custody two persons and while proceeding with them to another village shot at some villagers and killed one of them and after proceeding to another village extorted some money from those he had taken into custody a trial for murder and extortion is not bad for misjoinder. The case falls squarely within section 235 of the Code. The fact that the offence of extortion was committed at a different place and at a different time does not any the less make the act as one committed in the course of the same transaction. The trial is not vitiated especially when no prejudice in fact was caused to the accused.

Quaere —How far the violation of any express provision of the Code relating to the mode of trial or otherwise constitutes an illegality which vitiates the trial as distinguished from an irregularity which is curable under section 37, Criminal Procedure Code.

It is the obvious duty of the Court of Criminal Appeal to give a summary of the evidence of material witnesses and to appraise the evidence with a view to arriving at the conclusion whether the testimony of the witness should be believed. The Supreme Court cannot interfere with the finding arrived at on an appreciation of the evidence. (In the instant case the third Judge on difference of opinion between the two Judges confirmed the conviction on an appreciation of the evidence.)

Where the two Judges of the High Court on appeal are divided in their opinion as to the guilt of the accused in a murder charge and the third Judge to whom reference is made agrees with one of them who is upholding the conviction and sentence it is desirable as a matter of convention though not as a matter of strict law that ordinarily the extreme penalty should not be imposed.

On Appeal under Article 134 (1) (c) of the Constitution of India from the Judgment and Order, dated the 6th August, 1953, of the High Court of Judicature at Hyderabad, in Criminal Appeal No. 1557/6 of 1950, arising out of the Judgment and Order, dated the 16th October, 1950, of the Court of Special Judge, Warangal, in Case No. 28/2 of 1950.

A A Peerbhoy, J B Dadachangi and Rajinder Narain, Advocates for Appellant.
Porus A Mehta and P G Gokhale, Advocates for Respondent.

The Judgment of the Court was delivered by

Ghulam Hasan, J.—The appellant was tried and convicted by the Special Judge, Warangal for various offences under the Hyderabad Penal Code. These correspond to sections 302, 307, 347 and 384 of the Indian Penal Code, the sentences awarded under the first two sections respectively being death and life imprisonment and separate sentences of two years' rigorous imprisonment under the latter two

The two learned Judges of the High Court, who heard the appeal differed, Manohar Pershad, J., upholding the convictions and the sentences and M S Ali Khan, J., acquitting the appellant. The third learned Judge, A Srinivasachari, J., on reference which was occasioned by the difference of opinion agreed with Manohar Pershad, J. Leave to appeal to this Court was granted by the two agreeing Judges.

The occurrence which led to the prosecution of the appellant took place on 13th September, 1948, which was the beginning of the first day of Police Action in Hyderabad. The appellant, who was Reserve Inspector of Police stationed at Mahbubabad at the material time, according to the prosecution story, visited two villages Rajole and Korivi accompanied by a number of Razakars and the Police. He arrested Janaki Ramiah (P W 5) and Narella Ramulu (P W 9) at Rajole and took them to Korivi. Outside this village in the waste-land he spotted four men going to their fields and shot at them with his gun. The deceased Mura Muthiah and Somanaboyanna Muthandu (P W 2) were injured in the knee, while the other two Kotta Ramiah (P W 3) and Kancham Latchiah (P W 4) were uninjured. The latter two hid themselves behind the babul trees. P W 2 also ran away and hid himself in the *bayra* fields a few yards away but the deceased remained where he fell. The appellant searched for the three persons who had run away. He caught P W 3 and P W 4 and brought them to the spot where the deceased was lying but he could not trace P W 2. The appellant seeing that Mura Muthiah was not dead, shot him in the chest and killed him. The whole party consisting of P W 3, P W 4, P W 5 and P W 9 then went to Korivi village. The appellant stayed at the house of one Maikaldari in the village and spent the night there. Maikaldari and one Berda Agiah (P W 8) both asked the appellant why he had arrested P W 3 and P W 4, for they were not Congressmen. Upon this the appellant released them. The prosecution story proceeds that the father (P W 1) of the deceased saw the appellant in the night of the 13th September, and asked him why he had killed his son. The appellant without staying more advised him to cremate the dead body. P W 1 borrowed wood from the people and cremated the body. Four months later the appellant went and said at the Government bungalow, Korivi, sent for P W 1 and offered him Rs 200 as hush-money for not disclosing the offence. The offer was refused. P W 3 and P W 4 who had been released told the father of P W 2 next morning that his son was lying injured in the *bayra* field. He went and had P W 2 removed to the hospital where his injuries were attended to. On the same morning the appellant, who had detained P W 5 and P W 9 in custody, asked them to pay Rs 200 when they would be released. P W 5 went with a constable to the house of P W 6 and P W 7 and borrowed Rs 100 from each of them. On this being paid he was released. P W 9 was unable to pay any money and he was let off.

The defence was a denial of the offence. The appellant denied having gone to the village in question or having committed any of the offences attributed to him. He stated that he was posted at Mahbubabad in order to stop the subversive activities of the Communists and that the witnesses being Communists had falsely implicated him. He produced witnesses in defence.

The First Information Report was lodged on 14th April, 1949. This delay was due to the disturbed conditions prevailing at the time and does not affect the truth of the story. The appellant was prosecuted and the charge sheet submitted against him on 30th October, 1949. The charge was framed by a Munsiff

Magistrate who committed the appellant to the Sessions. As already stated, the learned Special Judge convicted and sentenced the appellant and his convictions and sentences were upheld by a majority of two Judges.

It has been argued by Mr Peerbhoy, learned counsel, on behalf of the appellant that his client had no fair trial and has detailed a number of circumstances as supporting his contention. We think it unnecessary to deal with each and every one of these circumstances as in our opinion they do not affect the substance of the matter and are too trifling to justify the conclusion that the appellant suffered any prejudice or that any miscarriage of justice had resulted. We shall confine ourselves only to a few of them which need examination. It was complained that the appellant was not furnished with copies of the statements of prosecution witnesses recorded by the Police and this hampered the appellant in cross-examining the witnesses with reference to their previous statements. It appears that the appellant filed an application through counsel on 28th August, 1950, asking for copies of such statements under section 162 of the Code of Criminal Procedure. The corresponding section of the Hyderabad Penal Code is 166 which is not the same as section 162. While under section 162 it is the duty of the Court to direct a copy of the statement of a witness recorded by the Police in the course of investigation to be furnished to the accused with a view to enable him to cross examine such a witness with reference to his previous statement, no such duty is imposed by section 166 and the matter is left entirely to the discretion of the Court. This application was made for re-cross examination of witnesses which obviously refers to the last stage of the prosecution evidence. The order passed on the application as translated is unintelligible and does not convey the real intention of the Court. The original which was shown to us, however, leaves no doubt whatever that the Court ordered that the case diaries and the statements were in Court and the appellant's counsel could look into them with a view to help him in the re-cross-examination of the witnesses but if the Court later felt the necessity of furnishing copies, the matter would be considered. No complaint was made before the Special Judge about any prejudice having been caused to the appellant by this order, nor was this point taken before the High Court. Had the appellant any legitimate ground for grievance on this score, he would no doubt have raised it before the High Court. We think, therefore, that there is no substance in this point.

It was also contended that the prosecution should have produced the duty register of the appellant who was a Government servant in order to put the matter beyond doubt whether the accused had left the Headquarters on the crucial date. We do not think that it was any part of the duty of the prosecution to produce such evidence, particularly in view of the fact that direct evidence of the offence was produced in the case. It appears, however, that the appellant himself summoned the Sub-Inspector of Police with the attendance register for 1358 Fash, corresponding to October, 1948. The Deputy Superintendent of Police in his letter had stated that the entries for October were made in the register for 1357 F and that register was destroyed during the Police action. The appellant's counsel inspected the register and on noticing that the entry for October did not find a place therein and had been made in the previous register for 1357 Fash, which was destroyed during the Police action he withdrew the witness. The appellant satisfied himself from the inspection of this register that the desired entries were not to be found. Since the register containing the material entries was destroyed,

it was impossible for the prosecution to discharge the alleged burden of proving the entries in the duty register on the material date

It was also faintly contended that there was no evidence to show that Mura Muthiah had actually died. The father of the deceased gave evidence that the dead body of his son was cremated by him and in this he was supported by other witnesses. There is no force in this point.

Upon the whole we are satisfied that the appellant has not been able to substantiate his contention that he did not have a fair trial.

The next contention advanced by the appellants' learned counsel is that there was a misjoinder of charges, that though the charges of murder and attempt to murder could be joined and tried together, the charges of extortion and wrongful confinement were distinct offences for which the appellant should have been charged and tried separately as required by the mandatory provisions of section 233 of the Code. The first two offences took place on 13th September, 1948, in the night while the act of extortion took place next morning on the 14th and the latter charge had nothing whatever to do with the offences committed on the previous night. Learned counsel contends that where as here, there is disobedience to an express provision as to the mode of trial contained in section 233, the trial is wholly vitiated and the accused is not bound to show that the misjoinder has caused any prejudice to him. The contention is based on the case of *Subrahmanya Ayyar v. King Emperor*¹ showing that the misjoinder of distinct offences being prohibited by the express provision of the Code renders the trial illegal and does not amount to a mere irregularity curable by section 537. This was a case in which the accused was charged with 41 acts extending over a period of two years which was plainly against the provisions of section 234 which permitted trial only for three offences of the same kind if committed within a period of twelve months. The decision of Lord Halsbury, Lord Chancellor in this case was distinguished in the case of *Abdul Rahman v. The King Emperor*², by the Privy Council. That was a case of conviction on a charge of abetment of forgery in which the depositions of some witnesses were not read over to witnesses but were handed over to them to read themselves. It was held that though the course pursued was in violation of the provisions of section 360, it was a mere irregularity within section 537 and that as no failure of justice had been occasioned the trial was not vitiated. Both the above cases were referred to by the Privy Council in *Babulal Chaukara v. King Emperor*³. The question in that case arose as to the true effect of section 239 (d), which provides that persons who are accused of different offences committed in the course of the same transaction may be charged and tried together. The question was whether the correctness of the joinder which depends on the sameness of the transaction is to be determined by looking at the accusation or by looking at the result of the trial. It was held that the relevant point of time is the time of accusation and not that of the eventual result. The charges in this case were conspiracy to steal electricity and theft of electricity both under the Electricity Act and under the Penal Code. The Privy Council referred to the fact that the parties had treated infringement of section 239 (d) as an illegality vitiating the trial under the rule

¹ (1901) 11 M.L.J. 233 L.R. 28 I.A. 1 L.R. 5 Rang. 53 (P.C.)
² 1 L.R. 25 Mad. 61 (P.C.)
³ (1926) 52 M.L.J. 585 L.R. 54 I.A. 96 3 (1928) 1 M.L.J. 647 L.R. 65 I.A. 158
 1 L.R. (1928) 2 Cal. 295 (P.C.)

stated in *Subrahmanya Ayyar v King Emperor*¹, as contrasted with the result of irregularity as held in *Abdul Rahman v The King Emperor*². The Privy Council merely assumed it to be so without thinking it necessary to discuss the precise scope of the decision in *Subrahmanya's case*¹ because in their view the question did not arise. Again in *Pulukuri Kottayya and others v Emperor*³ the Privy Council treated a breach of the provisions of section 162 of the Code as a mere irregularity curable under section 537 and as no prejudice was caused in the particular circumstances of that case the trial was held valid. Reference was made to *Subrahmanya Ayyar's case*¹, as one dealing with the mode of trial in which no question of curing any irregularity arises but if there is some error or irregularity in the conduct of the trial, even though it may amount to a breach of one or more of the provisions of the Code, it was a mere irregularity and in support of this reference was made to *Abdul Rahman's case*². Several decisions of the High Courts were referred to in course of the arguments with a view to showing what is the true state of the law in view of the Privy Council decisions referred to above but we do not think that that question arises in the present case. We are of opinion that the present is not a case under section 233 of the Code, and it is therefore unnecessary to consider whether the violation of its provisions amounts to an illegality vitiating the trial altogether or it is a mere irregularity which can be condoned under section 537. Section 233 embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a separate charge and every such charge should be tried separately. There is no doubt that the object of section 233 is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge or in separate charges and are tried together but the Legislature has engrafted certain exceptions upon this rule contained in sections 234, 235, 236 and 239. Having regard to the facts and the circumstances of this case we are of opinion that the present case falls under section 235. It provides that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with, and tried at one trial for, every such offence. The prosecution story as disclosed in the evidence clearly shows that the offence of extortion committed on the 14th September was one of a series of acts connected with the offence of murder and attempt to murder committed on the previous day in such a way as to form the same transaction. The prosecution case was that when the appellant accompanied by his party came, he caught hold of two persons (PW 5 and PW 9) at Rajole and proceeded to Konni. He took them into custody without any rhyme or reason. Then outside the village seeing the deceased, PW 2, PW 3 and PW 4 he shot at them. The deceased fell down while the others ran away. He pursued them and brought two of them back to the spot where the deceased was lying but was yet alive. He shot him in the chest and killed him. Then he proceeded to the village itself where he stayed for the night. He released PW 3 and PW 4 on the intercession of certain persons but kept PW 5 and PW 9 in wrongful confinement and released them only next morning after extorting Rs 200 from PW 5. These incidents related in the evidence leave no manner of doubt that from the moment the appellant started from the

¹ (1901) 11 M.L.J. 233 L.R. 28 I.A. 257 1 L.R. 5 Rango 33 (P.C.)
 I.L.R. 25 Mad 61 (P.C.) 3 (1917) 1 M.L.J. 219 L.R. (1915)
² (1926) 52 M.L.J. 585 L.R. 54 I.A. 95 74 I.A. 65 1 L.R. (1915) Mad. 1 (P.C.)

Police Station, he committed a series of acts involving killing, injuring people, unlawfully confining others and extorting money from one of them. We are satisfied that the series of acts attributed to the appellant constitute one transaction in which the two offences which are alleged to be distinct were committed. The case falls squarely within the purview of section 235 of the Code and we are, therefore, of opinion that such misjoinder was permitted by the exception. No question of contravention of any express provision of the Code such as section 233 arises and in the circumstances it is not necessary for us to consider how far the violation of any express provisions of the Code relating to the mode of a trial or otherwise constitutes an illegality which vitiates the trial as distinguished from an irregularity, which is curable under section 537. This conclusion in our opinion disposes of the contention about misjoinder of the charges. The fact that the offence of extortion was committed at a different place and at a different time does not any the less make the act as one committed in the course of the same transaction.

Turning to the merits of the matter, we are not satisfied that any prejudice was caused to the appellant in fact. It is not possible to say that the Court being influenced by the evidence on the question of extortion was easily led into the error of believing the evidence on the question of murder. The witnesses on the point of extortion are P W 5 and P W 9. These are the two persons who were taken away from village Rajole and were wrongfully confined, P W 5 being released on payment of Rs. 200 and the other let off without payment. These two witnesses are also witnesses to the fact of murder, in addition to the other three witnesses, P W 2, P W 3 and P W 4. P W 5 was injured by the gun shot but survived. The other two were scared on bearing the gun shot and ran away taking protection under the *babul* tree. It is not possible to contend that the Sessions Judge having believed the evidence of extortion from P W 5 must have been persuaded into believing that the story of murder deposed to by him must be correct for there is not only the evidence of P W 5 but three other independent witnesses.

Lastly it was contended that the judgment of one of the agreeing Judges Manohar Pershad J., is purely mechanical and does not show that he has applied his mind to the facts of the case. No such complaint is made about the judgment of the other agreeing Judge Srinivasachari J. It is true that the learned Judge has made copious quotations verbatim from the evidence of the witnesses and his comment upon the evidence is not as full and detailed as might be expected but this practice of writing judgments in this way seems fairly general in Hyderabad though we cannot help saying that it is not to be commended. It is the obvious duty of the Court to give a summary of the evidence of material witnesses and to appraise the evidence with a view to arriving at the conclusion whether the testimony of the witness should be believed. We do not think however, that the criticism that the judgment is mechanical and does not show a proper appreciation of the evidence is well founded.

The prosecution evidence was believed by the trial Judge and the defence evidence to the effect that the deceased was killed by the military and that the appellant was not present at the time of the occurrence was disbelieved. This finding was accepted by both the learned agreeing Judges. This Court cannot interfere with the finding arrived at on an appreciation of the evidence. We are satisfied that there is no good ground for disturbing the conviction of the appellant.

The only question which remains for consideration is whether the sentence of death is the appropriate sentence in the present case. No doubt there are no special circumstances which justify the imposition of any other but the normal sentence for the offence of murder. We think, however, that where the two Judges of the High Court on appeal are divided in their opinion as to the guilt of the accused and the third Judge to whom reference is made agrees with one of them who is upholding the conviction and sentence, it seems to us desirable as a matter of convention though not as a matter of strict law that ordinarily the extreme penalty should not be imposed. We accordingly, while maintaining the conviction of the appellant, reduce his sentence to one of transportation for life. In other respects the appeal stands dismissed. All the sentences will run concurrently.

Sentence reduced

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHR CHAND MAHAJAN *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Rajnarain Singh

*Appellant**

v

The Chairman, Patna Administration Committee, Patna and
another

Respondents

Patna Administration Act (Bihar and Orissa Act I of 1915) section 3 (1) (f)—Validity and scope—Power to the Executive authority to modify existing or future laws—Vires—Notification by order of Governor Bihar, on 23rd April 1951 picking out section 104 of Bihar and Orissa Municipal Act 1922 and extending it with modifications to an area—Validity

An executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms. It cannot include a change of policy.

In re *The Delhi Laws Act* 1912, 1951 S C R 747 (1951) S C J 527 (S C) followed.

Section 3 (1) (f) of the Patna Administration Act (Bihar and Orissa Act I of 1915) after its amendment empowers the delegated authority to pick any section it chooses out of the Bihar and Orissa Municipal Act 1922 and extend it to Patna and further it empowers the Local Government (and later the Governor) to apply it with such restrictions and modifications as it thinks fit.

Not only could an entire enactment with modifications be extended but also part of one. A section or sections can be picked out and applied. However when a section of an Act is selected for application whether it is modified or not it must be done so as not to effect any change of policy or any essential change in the Act regarded as a whole subject to that limitation. Section 3 (1) (f) of the impugned Act is *intra vires*.

The Notification of 23rd April 1951 issued by the Governor of Bihar picking section 104 out of the Bihar and Orissa Municipal Act and extending it with modifications to Patna Administration and Patna Village Areas does effect a radical change in the policy of the impugned Act. Therefore it travels beyond the authority which section 3 (1) (f) confers and consequently it is *ultra vires*.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 22nd day of December, 1952, of the High Court of Judicature at Patna in Miscellaneous Judicial Case No 78 of 1952.

Basant Chandra Ghose, Senior Advocate (*P K Chatterjee*, Advocate, with him) for Appellant.

Mahabir Prasad, Advocate-General of Bihar (*S P Varma*, Advocate, with him) for Respondent No 2.

The Judgment of the Court was delivered by

Bose, J.—The High Court of Patna granted the petitioner before it leave to appeal under Article 132 (1) of the Constitution on the ground that a substantial question of law relating to the interpretation of the Constitution was involved

The appellant is the Secretary of the Rate-payers' Association at Patna. He and the other members of his Association reside in an area which was originally outside the municipal limits of Patna and was not liable to municipal and cognate taxation. On 18th April, 1951, this area was brought within municipal limits and was subjected to municipal taxation. This was accomplished by a Notification of that date. By reason of this the appellant and the others whom he represents were called upon to pay taxes for the period 1st April, 1951 to 31st March, 1952. The Notifications were issued under sections 3 (1) (f) and 5 of the Patna Administration Act of 1915 (Bihar and Orissa Act I of 1915). The appellant claims that the Notifications are delegated legislation and so are bad and prays that sections 3 (1) (f) and 5 of the Act which permitted this delegation be condemned as *ultra vires*.

In order to appreciate the points raised it will be necessary to go back to the year 1911 when the Province of Bihar and Orissa was formed. It will also be necessary to bear in mind that we have to deal with three separate sections in the area which is now called Patna. In order to avoid confusion we will call them Patna City, Patna Administration and Patna Village respectively. It must be understood that this is a purely arbitrary nomenclature adopted by us for the purposes of this judgment and that they are neither so called nor so recognised anywhere else. Their boundaries have not been static but it will be necessary to keep them notionally distinct.

When the new Province was formed in 1911 the Bengal Municipal Act of 1884 applied to the whole of it. At that time one of the three portions of Patna with which we are concerned (namely, the portion we have called Patna City) was under a Municipality (the Patna City Municipality) created under the Bengal Act. This Municipality continued to function in the Patna City area after the creation of the new Province. The other two sections were not born as distinct entities till later and the areas which they now cover were not under any municipal or cognate jurisdiction.

The new Province required a new capital and Patna was chosen for the purpose. Quite naturally the City expanded and, following the general pattern in India, a new area grew up (distinct from the old City) which housed the headquarters of the new Government. Before long, it was thought expedient to bring this area under municipal jurisdiction and give it a municipality of its own rather than place it under the old city municipality. Accordingly, the Legislature of the new State passed the Patna Administration Act of 1915 (Bihar and Orissa Act I of 1915) to enable this to be done. This Act came into force on 5th January, 1916. The petitioner impugns sections 3 (1) (f) and 5 of the Act and the Notifications made under it on the ground that they permit delegated legislation which has hurt him and wrongly rendered him liable to municipal taxation.

Broadly speaking, the Act empowered the Local Government to create a new municipality (later called the Patna Administration Committee) for this new area which, in our arbitrary classification, we have called Patna Administration. The Act called this new area "Patna" and defined its boundaries in the Schedule

to the Act. This area did not include either the section which we have called Patna City or the one we have dubbed Patna Village.

Now the Legislature of this new State did not draw up a new Municipal Act nor did it apply the existing Bengal Municipal Act of 1884, which was at that time in force in the Province, to this new area which the Act of 1915 called "Patna" and which we have called Patna Administration. Instead by section 3 (1) (f) it empowered the Local Government to

"extend to Patna the provisions of any section of the said Act" (the Bengal Municipal Act of 1884) "subject to such restrictions and modifications as the Local Government may think fit."

This is a part of the impugned portion. Section 5, which is also impugned, runs—

"The Local Government may at any time cancel or modify any order under section 3."

Section 6 (b) is also relevant, though it is not challenged. It says, omitting unnecessary words, that—

The Local Government may

(b) include within Patna any local area in the vicinity of the same and defined in the notification.

We refer to this here because the area we have called Patna Village was later brought under the jurisdiction of a new municipality called the Patna Administration Committee by action taken under this section.

Armed with the powers which this Act conferred, the Local Government created the new Municipality and called it the Patna Administration Committee and, by a series of notifications with which we are not concerned, extended certain sections of the Bengal Municipal Act of 1884 to the area which we have called Patna Administration.

The result of all this was that up to 1922 there was in existence the Patna City Municipality with jurisdiction over the area we have called Patna City—the whole of the Bengal Municipal Act of 1884 applied there. Side by side was the new municipality called the Patna Administration Committee holding sway over the new area which we have called Patna Administration. The Bengal Municipal Act did not apply to this area of its own force; only certain sections which the Local Government had picked out under powers conferred by the Patna Administration Act of 1915, were applied there. The third area, which we have called Patna Village, and which is the area which really concerns us, was free from municipal control.

In 1922 the Provincial Legislature enacted the Bihar and Orissa Municipal Act, 1922 (Bihar and Orissa Act VII of 1922). It repealed the whole of the Bengal Municipal Act of 1884 and substituted the new Act of 1922 for it. This only affected the Patna City area and did not affect the Patna Administration area because the Bengal Act was never applied to that area as such. The portions of it which were picked out to have force there were applied by reason of the Patna Administration Act, 1915 and that constituted, in truth and in fact, independent legislation. The result was that the new Act of 1922 came into effect in the Patna City area and the sections of the Bengal Act which were applied by reason of the Patna Administration Act continued in force in the Patna Administration area. The area which we have called Patna Village was still unaffected.

Understandably, the new Province preferred its own legislation to that of Bengal. But despite the passing of the Bihar and Orissa Municipal Act in 1922, the Local Government, acting under section 3 (1) (f) of the Patna Administration Act, 1915, could only extend sections of the Bengal Act to the Patna Administration area and not sections of its own Act. This was because of section 3 (1) (a) whose provisions we need not examine. To set this right the Bihar and Orissa Legislature passed an amending Act in 1928 (Bihar and Orissa Act IV of 1928) called the Patna Administration (Amendment) Act of 1928. But that only provided for the future. So far as the present and the past were concerned, section 4 of the amending Act provided—

Any section of the Bengal Municipal Act 1884 extended to Patna under clause (f) of sub-section (1) of section 3 of the said Act (that is the Patna Administration Act, 1915) 'shall be deemed to continue to extend to Patna until the extension of such section to Patna is expressly cancelled by notification.'

Three years later the Governor cancelled all previous notifications extending sections of the Bengal Act of 1884 and the Bihar and Orissa Act of 1922 to the Patna Administration area. In their places he picked out certain sections of the Bihar and Orissa Act of 1922, modified others, and extended the lot so selected and modified to the Patna Administration area. This was done by Notification, No 4594, L S G, dated 25th April, 1931. It gave a sort of fresh municipal code to this area. There were, however, significant differences between this and the Act of 1922, for example, sections 4, 5, 6, 84 and 104 of the Act of 1922 were omitted altogether.

Nothing further happened till 1951. In the meanwhile, the Constitution of India came into force on 26th January, 1950. We refer to this because before the Constitution the Local Government was empowered to act under section 3 (1) (f) and section 6 (b) of the Patna Administration Act, 1915. After the Constitution these powers were transferred to the Governor of Bihar.

During this interval Patna was expanding and the area which we have called Patna Village, originally just a village area, began to be built upon. It adjoined the Patna Administration area, only a road separated the two. It was therefore felt that this should also be brought under Municipal control. But instead of creating a third Municipality the authorities thought it best to place it under the jurisdiction of the Patna Administration Committee. Here again, instead of legislating direct they fell back on the Patna Administration Act, 1915, as amended in 1928. On 18th April, 1951, a Notification was published in the Gazette by order of the Governor of Bihar. It is Notification No MVP 45/50 3645, L S G, dated 11th April, 1951. It runs as follows:

'In exercise of the powers conferred by clause (b) of section 6 of the Patna Administration Act, 1915 (Bihar and Orissa Act I of 1915) the Governor of Bihar is pleased to declare that the area defined below is included within Patna.

The area referred to is the third of the areas we are considering, namely, the one we have called Patna Village. The effect of this was to bring Patna Village under the municipal control of the Patna Administration Committee.

Five days later, the Governor of Bihar picked section 104 out of the Bihar and Orissa Municipal Act of 1922, modified it and extended it in its modified form to the Patna Administration and Patna Village areas. This was by Notification, No M/A1-202 51-406, L S G, dated 23rd April, 1951. The modified version ran as follows —

"104 Assessment of taxes—When the Patna Administration Act, 1915 (B. & O Act I of 1915) is first extended to any place, the first tax on holdings, latrines or water may be levied from the beginning of the quarter next to that in which the assessment of the tax has been completed in the area to which the Act is extended"

The High Court, purporting to apply *In re The Delhi Laws Act, 1912*¹ held that the impugned sections and the Notifications complained of are *intra vires*

We are only concerned with the Patna Village area in this case. The appellant and those he represents all live in that area and are the ones who impugn the validity of the taxes levied on them. They were brought under Municipal control on 18th April, 1951. The Bengal Municipal Act of 1884 was no longer one of the existing laws in the State of Bihar on that date. It was repealed in full in 1922 and was replaced by the Bihar and Orissa Municipal Act of 1922. The selected sections of the Bengal Act of 1884 which the Local Government had picked out and applied to Patna Administration were also repealed on 25th April, 1931 and in their place was substituted another set of sections picked out by the Local Government from the Bihar and Orissa Act of 1922 and modified in places. The facts accordingly narrow down to this

In 1928 an executive authority (the Local Government of Bihar and Orissa), subject to the legislative control of the Bihar and Orissa Legislature, was empowered by that Legislature (because of Act I of 1915 amended by Act IV of 1928) to do the following things —

(1) to cancel or modify any existing municipal laws in the Patna Administration area,

(2) to extend to this area all or any of the sections of the Bihar and Orissa Municipal Act of 1922 subject to such restrictions and modifications as it considered fit,

(3) to add to the Patna Administration area other areas not already under municipal control

This, in short, is the effect of sections 3 (1) (f), 5 and 6 (b) of the Patna Administration Act of 1915 as amended in 1928. Armed with this authority, the Local Government (and later the Governor) exercised all three powers

On 25th April, 1931, the Local Government repealed the existing law in the Patna Administration area, namely, the sections of the Bengal Act of 1884 which had been applied there from time to time. In its place, it introduced a new set of laws culled from the Bihar and Orissa Act of 1922 with such restrictions and modifications as it thought fit. Then on 18th April, 1951, the Governor added Patna Village to the Patna Administration area. And finally, on 23rd April, 1951, he added a modified version of section 104 of the Bihar and Orissa Municipal Act of 1922 to the municipal laws in these two combined areas

The first question is whether the Notification of 25th April, 1931, can be attacked by the petitioner. In our opinion, it cannot. As we have already pointed out, this Notification gave a sort of fresh municipal code to the Patna Administration area. But it did not affect the area with which we are concerned, namely, the Patna Village area. It was limited to Patna Administration. The petitioner therefore cannot challenge it because it does not affect him and the question whether

it is open to challenge by other persons does not arise. We are accordingly unable to give him the declaration which he seeks regarding that notification.

We turn next to the Notification of 23rd April, 1951. This does affect him because it subjects him to taxation. It was made under section 3 (1) (f), therefore, it will be necessary to examine (1) whether the Notification travels beyond the impugned portion of the Act and (2) if not, whether section 3 (1) (f) is itself *ultra vires*. But we cannot do this until we examine the decision of this Court in the *Delhi Laws Act case*¹.

Because of the elaborate care with which every aspect of the problem was examined in that case, the decision has tended to become diffuse, but if one concentrates on the matters actually decided and forgets for a moment the reasons given a plain pattern emerges leaving only a narrow margin of doubt for future dispute.

The Court had before it the following problems. In each case, the Central Legislature had empowered an executive authority under its legislative control to apply, at its discretion, laws to an area which was also under the legislative sway of the Centre. The variations occur in the type of laws which the executive authority was authorised to select and in the modifications which it was empowered to make in them. The variations were as follows:

(1) Where the executive authority was permitted, at its discretion, to apply without modification (save incidental changes such as name and place), the whole of any Central Act already in existence in any part of India under the legislative sway of the Centre to the new area.

This was upheld by a majority of six to one.

(2) Where the executive authority was allowed to select and apply a Provincial Act in similar circumstances.

This was also upheld, but this time by a majority of five to two.

(3) Where the executive authority was permitted to select future Central laws and apply them in a similar way.

This was upheld by five to two.

(4) Where the authorisation was to select future Provincial laws and apply them as above.

This was also upheld by five to two.

(5) Where the authorisation was to repeal laws already in force in the area and either substitute nothing in their places or substitute other laws, Central or Provincial, with or without modification.

This was held to be *ultra vires* by a majority of four to three.

(6) Where the authorisation was to apply existing laws, either Central or Provincial, with alterations and modifications, and

(7) Where the authorisation was to apply future laws under the same conditions.

The views of the various members of the Bench were not as clear cut here as in the first five cases, so it will be necessary to analyse what each Judge said.

The opinion of Kania, C.J., will be found at pages 794-797. Put briefly his view was that only Parliament can effect modifications in any "essential legis-

¹ (1951) S.C.J. 527 (1951) S.C.R. 747 (S.C.)

lative function" viz., "the determination of the legislative policy and its formulation as a rule of conduct". For this reason he was prepared to uphold what he called "conditional" or "subsidiary" or "ancillary" legislation, but not the application by an executive authority of Provincial Acts to which the Central Legislature had not applied its mind at all (page 801), and for the same reason he excluded the application of all future legislation.

The present Chief Justice (Mahajan, J., as he then was) took an even stricter view. He was prepared to authorise delegation of ancillary or ministerial powers (pages 938 and 946) but except for that he said—

Parliament has no power to delegate its essential legislative functions to others whether State legislatures or executive authorities except, of course functions which really in their true nature are ministerial.

As against this, three of the Judges were more liberal. Das, J., was of the opinion that so long as Parliament did not abdicate or efface itself and retained control in the sense of retaining the right to recall or destroy or set right or modify anything its delegate did, it could confer on the delegate *all* the rights of legislation which it itself possessed (page 1068). Patanjali Sastri, J. (as he then was) took the same extreme view (pages 857, 858 and 870). Fazl Ali, J., did not go as far though he upheld all the Acts which were impugned in that case. At page 830 he said that—

'the legislature must normally discharge its primary legislative function itself and not through others',

but that it may

"utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation."

He dealt with the power to modify at page 846 and said—

"The power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes."

The other two Judges took an intermediate view. Mukherjea, J., said that essential legislative functions cannot be delegated and at pages 982 to 984 he indicated what he meant.

"The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct and at page 1000—

"With the merits of the legislative policy the Court of law has no concern. It is enough if it is defined with sufficient precision and definiteness so as to furnish sufficient guidance to the executive officer who has got to work it out. If there is no vagueness or indefiniteness in the formulation of the policy, I do not think that a Court of law has got any say in the matter."

Dealing with the word "modification" he said at page 1006—

"The word 'modification' does not, in my opinion, mean or involve any change of policy but is confined to alteration of such a character which keeps the policy of the Act intact and introduces such changes as are appropriate to local conditions of which the executive government is made the Judge."

At pages 1008 and 1009 he explained this further and limited the modifications to "local adjustments or changes of a minor character".

Bose, J., contented himself at page 1121 by saying that the delegation cannot extend to the "altering in essential particulars of laws which are already in force in the area in question". But he added at page 1124—

'My answers are however subject to this qualification. The power to 'restrict and modify' does not import the power to make essential changes. It is confined to alterations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area. To alter the essential character of an Act or to change it in material particulars is to legislate and that namely the power to legislate all authorities are agreed cannot be delegated by a legislature which is not unfettered.

In our opinion, the majority view was that an executive authority, can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above—it cannot include a change of policy.

Now coming back to the Notification of 23rd April, 1951, its *vires* was challenged on many grounds but it is enough for the purposes of this case to hold that the action of the Governor in subjecting the residents of the Patna village area to municipal taxation without observing the formalities imposed by sections 4, 5 and 6 of the Bihar and Orissa Municipal Act of 1922 cuts across one of its essential features touching a matter of policy and so is bad.

The Act of 1922 applied to the whole of Bihar and Orissa and one of its essential features is that no municipality competent to tax shall be thrust upon a locality without giving its inhabitants a chance of being heard and of being given an opportunity to object. Sections 4, 5 and 6 afford a statutory guarantee to that effect. Therefore, the Local Government is under a statutory duty imposed by the Act in mandatory terms to listen to the objections and take them into consideration before reaching a decision. In our opinion, this is a matter of policy, a policy imposed by the legislature and embodied in sections 4, 5 and 6 of the Act. We are not able to brush this aside as negligible and it cannot, in our opinion, be left to an executive authority to tear up this guarantee in disregard of the legislature's solemnly expressed mandate. To do so would be to change the policy of the law and that, the majority in the *Delhi Laws Act case*¹ say cannot be done by a delegated authority. But the Notification cannot be *ultra vires* if it does not travel beyond the powers conferred by a law which is good. It will therefore be necessary to examine the *vires* of section 3 (1) (f) in the light of the *Delhi Laws Act* decision¹.

Now what exactly does section 3 (1) (f) authorise? After its amendment it does two things—first, it empowers the delegated authority to pick any section it chooses out of the Bihar and Orissa Municipal Act of 1922 and extend it to "Patna", and second, it empowers the Local Government (and later the Governor) to apply it with such 'restrictions and modifications' as it thinks fit.

In the *Delhi Laws Act case*¹, the following provision was held to be good by a majority of four to three

The Provincial Government may extend with such restrictions and modifications as it thinks fit any enactment which is in force in any part of British India at the date of such notification

Mukherjea and Bose, JJ., who swung the balance, held that not only could an entire enactment with modification be extended but also a part of one, and indeed

¹ (1951) S.C.J. 527 (1951) S.C.R. 747 (S.C.)

that was the actual decision in *Burah's case*¹ on which the majority founded, (see Mukherjea, J, at page 1000 and Bose, J, at pages 1106 and 1121) But Mukherjea and Bose, JJ, both placed a very restricted meaning on the words "restriction" and "modification" and, as they swung the balance, their opinions must be accepted as the decision of the Court because their opinions embody the greatest common measure of agreement among the seven Judges

Now the only difference between that case and this is that whereas in the former case the whole of an enactment, or a part of it, could be extended, here, any section can be picked out. But to pick out a section is to apply a part of an Act, and to pick out a part is to effect a modification, and as the previous decision holds that a part of an Act can be extended, it follows that a section or sections can be picked out and applied, as in *Burah's case*¹ where just that was done, also, for the same reason that the whole or a part of an Act can be modified, it follows that a section can also be modified. But even as the modification of the whole cannot be permitted to effect any essential change in the Act or an alteration in its policy, so also a modification of a part cannot be permitted to do that either. If that were not so, the law, as laid down in the previous decision, could be evaded by picking out parts of an Act only, with or without modification, in such a way as to effect an essential change in the Act as a whole. It follows that when a section of an Act is selected for application, whether it is modified or not it must be done so as not to effect any change of policy, or any essential change in the Act regarded as a whole. Subject to that limitation we hold that section 3(1) (f) is *intra vires* that is to say, we hold that any section or sections of the Bihar and Orissa Municipal Act of 1922 can be picked and applied to "Patna" provided that does not effect any essential change in the Act or alter its policy

The Notification of 23rd April, 1931 does, in our opinion, effect a radical change in the policy of the Act. Therefore, it travels beyond the authority which, in our judgment, section 3 (1) (f) confers and consequently it is *ultra vires*

It is not necessary to examine the *vires* of section 5 of the Act of 1915 which was also impugned because no action taken under it has hurt the appellant and so he cannot question its *vires*

The result is that the appeal succeeds. We hold—

(1) that section 3 (1) (f) is *intra vires* provided always that the words "restriction" and "modification" are used in the restricted sense set out above, and

(2) that the Notification of 23rd April, 1931, is *ultra vires*

The question about the *vires* of the Notification of 25th April, 1931, and of section 5 does not arise

The respondents will pay the appellant's costs here and in the High Court.

Appeal allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —B K MUKHERJEA, VIVIAN BOSE AND GHULAM HASAN, JJ.

Kalshanker Das and another

Appellants *

v

Dhirendra Nath Patra and others

Respondents

Ratio Lio—Laid down—A question by—How far binding—Then reversioner joining in alienation or admitting existence of necessity—Effect—Actual reversion—If bound by admission by his father

R, a mother who inherited the properties of her deceased son *X* executed a security bond in favour of the mortgagee of her other son *Y*, who was threatened with legal proceedings for having included in his mortgage two items of property which had already been sold. *Y* having died the mortgagee sued and in execution sale the properties were purchased by a stranger who then sold them to others. After the death of *R* the plaintiffs the reversionary heirs of *X* sued to recover possession of the properties alleging that the security bond executed by *R* not being supported by legal necessity the sale in execution of the mortgage and subsequent sale by the purchaser thereof could pass only the right, title and interest of *R* and could not affect the reversionary rights of the plaintiffs.

Held The only object of executing the security bond was to protect *Y*, who was threatened with legal proceedings by his creditor for having included a non-existent property in the mortgage bond. *R* might have been actuated by a feeling of maternal affection to save her son from a real or imaginary danger. But by no stretch of imagination could it be regarded as a prudent act on the part of a Hindu female heir which was necessary for the protection of the estate of the last male holder. The immediate reversioner *Y* who joined in the execution of the security bond must be deemed to have consented to the transaction. Such consent may raise a presumption that the transaction was for legal necessity or that the mortgagor had acted therein after proper and *bona fide* enquiry and has satisfied himself as to the existence of such necessity. But this presumption is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and there has been no proper and *bona fide* enquiry by the mortgagee. [On the facts transpiring in evidence it was found that the presumption was rebutted.]

No body has a vested right so long as the widow is alive and the eventual reversioner does not claim through any one who went before him. The admissions if any made by the father of the plaintiffs could not in any way bind them as they claim as heirs of the last male holder and not of their father.

If there is no legal necessity the transferee gets only the widow's estate which is not even an indefeasible life estate for it can come to an end not merely on her death but on the happening of other contingencies like remarriage, adoption, etc.

If there is no necessity in fact or if the alienor could not prove that he made *bona fide* enquiries and was satisfied about its existence the transfer is undoubtedly not void but the transferee would get only the widow's estate in the property which does not affect in any way the interest of the reversioner. The subsequent transferee could not claim to have acquired any higher right than what his predecessor had and it is immaterial whether he *bona fide* paid the purchase money or took proper legal advice.

On appeal from the judgment and decree, dated the 29th March, 1950, of the High Court of Judicature at Calcutta in Appeal from Original Decree, No. 121 of 1945 arising from the decree, dated the 22nd December, 1944 of the Court of Subordinate Judge at Alipore in Title Suit No. 70 of 1941.

N C Chatterjee, Senior Advocate (*C N Lask*, *D N Mukherjee* and *Sukumar Ghose*, Advocates, with him) for Appellants

S P Sinha, Senior Advocate (*B B Haldar* and *S C Bannerji*, Advocates, with him) for Respondents Nos. 1 to 3

The Judgment of the Court was delivered by

Mukherjee, J—This appeal, which has come before us, on a certificate granted by the High Court of Calcutta, under Article 133 (1) of the Constitution, is directed against a judgment and decree of a Division Bench of that Court dated the 29th March, 1950, affirming on appeal, those of the Subordinate Judge Fourth Court, Alipore, passed in Title Suit No 70 of 1941

The appellants before us are the heirs and legal representatives of the original defendant No 3 in the suit, which was commenced by the plaintiffs respondents to recover possession of the property in dispute on establishment of their title, as reversionary heirs of one Haripada Patra, after the death of his mother Rashmoni, who got the property in the restricted rights of a Hindu female heir on Haripada's death. To appreciate the contentions that have been raised by the parties to this appeal it would be necessary to narrate the material facts in chronological order

The property in suit which is premises No 6 Dwarik Ghose's Lane, situated in the suburb of Calcutta admittedly formed part of the estate of one Mahendra Narayan Patra, a Hindu inhabitant of Bengal owning considerable properties, who died on the 17th April, 1903 leaving him surviving his widow Rashmoni, two infant sons by her, Mohini Mohan and Haripada and a grandson Ram Narayan by a predeceased son Shyama Charan. Shyama Charan was the son of Mahendra by his first wife, who died during his life time. On the 17th February 1901, Mahendra executed a will by which he made certain religious and charitable dispositions and subject to them directed his properties to be divided amongst his infant sons Mohini and Haripada and his grandson Ram Narayan. Ram Narayan was appointed executor under the will. After the death of Mahendra Ram Narayan applied for probate of the will and probate was obtained by him on the 6th of October 1904. Ram Narayan entered upon the management of the estate. He developed extravagant and immoral habits and soon ran into debt. The bulk of the properties were mortgaged to one Karonsashi who having obtained a decree on the mortgage applied for sale of the mortgaged properties. Thereupon Rashmoni on behalf of her infant sons instituted a suit against the mortgagee and the mortgagor and got a declaration that the mortgage decree could not bind the infants' shares in the properties left by their father. This judgment was given on the 31st March, 1909. On the 13th August 1909 the two infant sons of Mahendra to wit Mohini and Haripada by their mother and next friend Rashmoni instituted a suit in the Court of the Subordinate Judge at Alipore being Title Suit No 45 of 1909 claiming administration of the estate left by Mahendra as well as partition and accounts on the basis of the will left by him. On the 14th of August, 1909, one Baroda Kanta Sarkar, Sheristadar of the Court of the District Judge Alipore, was appointed with the consent of both parties receiver of the estate forming the subject-matter of the litigation. The receiver took possession of the properties immediately after this order was made. The management by the receiver, as it appears, was not at all proper or beneficial to the interest of the two sons of Mahendra. Mahendra himself left no debts and whatever debts were contracted, were contracted by Ram Narayan to meet his own immoral and extravagant expenses. The receiver however went on borrowing large sums of money upon *ex parte* orders received from the Court, the ostensible object of which was to pay off the debts due by Ram Narayan which were not at all binding on the plaintiffs. Fearing that the longer the suit continued and the properties remained in the hands of the receiver the

more harmful it would be to the interests of the minors, Rashmoni on behalf of the minors compromised the suit with Ram Narayan and a Solenama was filed on the 13th June, 1910. The terms of the compromise in substance, were, that the properties in suit were to be held in divided shares between the three parties and specific allotments were made in favour of each, the properties allotted to the share of Haripada being specified in schedules *Gha* and *Chha* attached to the compromise petition. It was further provided that the receiver would be discharged on submitting his final accounts. It may be mentioned here that the property which is the subject matter of the present suit was under the Solenama, allotted to the share of Haripada. On the very day that the compromise was filed, Rashmoni applied for discharge of the receiver. The Court made an order directing the receiver to submit his final accounts within one month, or as early as possible, when the necessary order for discharge would be made. It was further directed that as the suit was disposed of on compromise the receiver should discontinue collecting rents and profits due to the estate from that day. This order however was modified by a subsequent order made on 23rd June, 1910, which directed that the receiver was to continue in possession of the estate until he was paid whatever was due to him for his ordinary commission and allowances and until the parties deposited in Court the amounts borrowed by the receiver under orders of the Court or in the alternative gave sufficient indemnity for the same. After this, Rashmoni on behalf of her minor sons filed two successive applications before the Subordinate Judge praying for permission to raise by mortgage, of a part of the estate, the moneys necessary for releasing the estate from the hands of the receiver. The first application was rejected and the second was granted, after it was brought to the notice of the Subordinate Judge that the receiver was attempting to dissuade prospective lenders who were approached on behalf of Rashmoni, to lend any money to her. On the 16th of January, 1911, Haripada, the younger son of Rashmoni, died and his interest devolved upon his mother as his heir under the Hindu Law. On the 28th January 1911, the following order was recorded by the Subordinate Judge

The receiver has filed a statement showing the amount as due to him up to the end of the current month. This claim amounts to Rs. 20,950-2 6 pies only. The parties may deposit the sum on or before the 1st February next in Court and on such deposit the receiver will be discharged and the possession of the estate of late Mahendra Narayan Palra will be made over to the parties.

On the very same day Mohini executed a mortgage (Exhibit M-1) in favour of one Suhasini Das by which he hypothecated the properties allotted to his share and also his future interest as reversioner to the share of Haripada, to secure an advance of Rs. 30,000. The loan was to carry interest at the rate of 18 per cent per annum. One thing may be mentioned in connection with this mortgage and that is, that amongst the properties included in the mortgage were two properties namely, premises No 15/1 and 16, Chetahat Road, which had already been sold and to which the mortgagor had no title at the date of the mortgage. On the 1st February, 1911, Mohini deposited in Court the sum of Rs. 20,950 2 6 pies, being the amount alleged to be due to the receiver and the Court by an order passed on that date directed the release of the estate from the hands of the receiver. After the estate was released a petition was filed on behalf of the plaintiffs on the 15th February, 1911, praying that the loans said to be contracted by the receiver should not be paid out of the money deposited in Court as these borrowings were made not for the protection of the estate but only for the personal benefit of the defendant Ram Narayan and to pay off his creditors. It was contended that the loans raised

by the receiver were not raised in good faith, after proper notice to the plaintiffs but on the strength of orders which he obtained *ex parte* from the Subordinate Judge without disclosing the material facts. This application was rejected by the Court on the 23rd February, 1911. After this order was made, the plaintiffs put in a petition praying that payment of the moneys due to the creditor with the exception of what was necessary to pay off one of the creditors, named Rakhai Das Adhya, be stayed till the following Monday as the plaintiffs wanted to move the High Court against the order of the Subordinate Judge mentioned above. The Court granted this prayer and on the 2nd of March following, orders were received from the High Court directing that the moneys were to be detained in Court pending further orders. The High Court made order on the plaintiff's petition on the 29th May, 1911. The learned Judges were very critical of the appointment of the Sheristadar of the Court as receiver of the estate and in no measured terms blamed the Subordinate Judge for passing *ex parte* orders for raising loans on the applications of the receiver without any investigation at all and the receiver also for borrowing money not for the benefit of the estate but for the personal benefit of Ram Narayan the defendant. The High Court directed a full and proper investigation of the accounts of the receiver by a Commissioner and a Vakil of the High Court was appointed for that purpose. The Commissioner after a protracted enquiry submitted his report which was accepted by the High Court. Under the final orders passed by the High Court not only were the plaintiffs held not liable to pay any money to the receiver but the receiver was directed to pay a sum of Rs. 6,708 to the plaintiffs. The plaintiffs were also to receive Rs. 4,084 from the defendant Ram Narayan. The defendant was to pay Rs. 19,124 to the receiver and the receiver was made personally liable for the loans that he had incurred. This order was made on the 23rd July, 1913.

In the meantime while the investigation of accounts was going on under orders of the High Court, Rashmoni together with her son Mohini executed a security bond (Exhibit E-1) on the 1st August 1911 and it is upon the legal effect of this document that the decision of this case practically depends. By this security bond, which was executed in favour of Suhasini Das, the mortgagee in the mortgage bond of Mohini, Rashmoni purported to hypothecate all the properties that she got as heir of Haripada as additional security for the loan of Rs. 30,000 already advanced to Mohini under the mortgage. As is stated already, two properties situated at Chetla were included in the mortgage of Mohini although they were already sold. The security bond recites that the mortgagee having discovered this fact was about to institute legal proceedings against the mortgagor and it was primarily to ward off these threatened proceedings and remove any apprehension from the minds of the mortgagee about the sufficiency of the security that this bond was executed. It is further stated in the bond that the estate of Haripada in the hands of his mother was benefited by the deposit of Rs. 20,950 in Court by Mohini Mohan out of the sum of Rs. 30,000 borrowed on the mortgage and that Mohini had spent the remaining amount of the loan towards clearing certain debts of Rashmoni herself and to meet the litigation and other expenses of both of them. Mohini died soon after on the 8th of November, 1911. On 13th October, 1917, Suhasini instituted a suit for enforcing the mortgage and the security bond against Rashmoni and the heirs of Mohini. A preliminary decree was passed on compromise in that suit on the 24th September, 1918 and on the 25th July, 1919, the decree was made final. The decree was put into execution and on the 15th

September, 1919, along with other properties, the property in dispute was put up to sale and it was purchased by Annada Prasad Ghose for Rs 13,500. On the 14th November, 1919, Bhubaneswari, wife of Ram Narayan, as guardian of her infant sons filed a suit, being Title Suit No 254 of 1919 against Suhasini, Rashmoni and Annada attacking the validity of the mortgage decree obtained by Suhasini as well as the sale in execution thereof. The suit ended on the 6th July, 1921 and the plaintiff gave up her claim. On 5th September, 1922, Annada Ghose borrowed a sum of Rs 10,000 from Sarat Kumar Das, the original defendant No 3 in the suit and the father of the present appellants and by way of equitable mortgage deposited with the lender the title deeds of the property No 6, Dwark Ghose Lane. On the 14th September, 1925, Annada sold the property by executing a conveyance in favour of the mortgagee Sarat Kumar Das for a consideration of Rs 15,500. On the 8th June, 1939, Rashmoni died. About a year later on 15th July, 1940, the three sons of Ram Narayan, who are the reversionary heirs of Haripada after the death of Rashmoni, commenced the present suit in the Court of the Subordinate Judge at Alipore claiming to recover possession of the property on the allegation that the security bond executed by Rashmoni not being supported by legal necessity the sale in execution of the mortgage as well as the subsequent conveyance in favour of Sarat Kumar Das could pass only the right, title and interest of Rashmoni and could not affect the reversionary rights of the plaintiffs. Several other persons were impleaded as parties defendants and a number of issues were raised with which we are not concerned in this appeal. What concerns us in this appeal is the dispute between the plaintiffs on the one hand and defendant No 3 on the other and this dispute centered round three points, namely,

(1) Whether the security bond (Exhibit E-1) executed by Rashmoni along with Mohuni was executed for legal necessity and was therefore binding on the reversioners of Haripada after the death of Rashmoni?

(2) Whether the fact that Mohuni, who was the presumptive reversioner at that time joined with his mother in executing the security bond would make it binding on the actual reversioner after the death of Rashmoni? In any event if such consent on the part of the presumptive reversioner raised a presumption of legal necessity, was that presumption rebutted in the present case by the evidence adduced by the parties?

(3) Whether the title of defendant No 1 was protected, he being a stranger purchaser who had purchased the property from the purchaser at an execution sale after making proper enquiries and obtaining legal advice?

The trial Judge by his judgment, dated the 22nd December, 1944, decided all these points in favour of the plaintiffs and decreed the suit. On appeal by the defendant to the High Court, the decision of the trial Judge was affirmed. The heirs of defendant No 3 have now come up to this Court and Mr Chatterjee appearing in support of the appeal has reiterated all the three points which were urged on behalf of his clients in the Courts below.

On the first point both the Courts below have held concurrently, that there was absolutely no legal necessity which justified the execution of the security bond by Rashmoni in favour of Suhasini. Mr Chatterjee lays stress on the fact that it was a matter of imperative necessity for both the plaintiffs to get back the estate of their father from the hands of the receiver as the debts contracted by the receiver were mounting up day after day. It is pointed out that on the 28th January, 1911,

the Court had made a peremptory order to the effect that the properties could be released, only if the plaintiffs deposited Rs 20,950 annas odd on or before the 1st February, next. In order to comply with this order Mohini had no other alternative but to borrow money on the mortgage of his properties and thus he had to do before the 1st February, 1911. It is true that because of the unfortunate death of Haripada only a few days before, Rashmoni could not join in executing the mortgage but she, as heir of Haripada, was really answerable for half of the money that was required to be deposited in Court. It is said that this was not a mere moral obligation but a legal liability on the part of the lady, as Mohini could have claimed contribution from her to the extent that Haripada's estate was benefited by the deposit. The execution of the security bond therefore was an act beneficial to the estate of Haripada. The contentions, though somewhat plausible at first sight, seem to us to be wholly without substance. In the first place the money borrowed by Mohini or deposited by him in Court did not and could not benefit Haripada's estate at all. As was found, on investigation of accounts, under orders of the High Court later on, nothing at all was due to the receiver by the estate of Haripada or Mohini. On the other hand, both the brothers were entitled to get a fairly large sum of money from the receiver. The trial Judge found that there was no urgent necessity to borrow money for releasing the estate and in fact it was Mohini who acted in hot haste to execute the mortgage, his only object being to get the properties in his own hands. It may be, that it was not possible to know the actual state of affairs with regard to the receiver's accounts and consequently it might well have been thought prudent to borrow money to ward off what was considered to be a danger to the estate. This might furnish some excuse or explanation for Mohini's borrowing money on the 28th January, 1911, but that could not make the act of Rashmoni in executing the security bond, seven months after that event, an act of prudent management on her part dictated either by legal necessity or considerations of benefit to the estate of her deceased son. In the first place it is to be noted that the total amount borrowed by Mohini was Rs 30,000 out of which Rs 20,950 only were required to be deposited in Court. The recital in the security bond that the rest of the money was spent by Mohini to pay off certain debts of Rashmoni herself and also to meet the litigation and household expenses of both of them has been held by the Subordinate Judge to be false. It has been found on facts that Rashmoni had no occasion to incur any debts either for litigation expenses or for any other purpose. But the most important thing that would require consideration is the state of things actually existing at the time when the security bond was executed. Even if the release of the estate was considered to be desirable, that had been already accomplished by Mohini who borrowed money on his own responsibility. The utmost that could be said was that Rashmoni was bound to reimburse Mohini to the extent that the deposit of money by Mohini had benefited the estate of Haripada. The High Court has rightly pointed out that Rashmoni did not execute the bond to raise any money to pay off her share of the deposit and in fact no necessity for raising money for that purpose at all existed at that time. As has been mentioned already, by an order passed by the High Court on the revision petition of Mohini and his mother against the order of the Subordinate Judge, dated the 23rd February, 1911, the whole amount of money deposited in Court on the 1st February, 1911, with the exception of a small sum that was paid to a creditor, with the consent of both parties, was detained in Court. The High Court disposed of the revision case on 29th May, 1911 and directed invest-

gation into the accounts of the receiver by a Commissioner appointed by it. As said already the Court passed severe strictures on the conduct of the receiver as well as of the Subordinate Judge and plainly indicated that the moneys borrowed by the receiver were borrowed not for the benefit of the plaintiffs at all. Undoubtedly the accounts were still to be investigated but what necessity there possibly could be for Rashmoni to execute after the High Court had made the order as stated above a security bond by which she mortgaged all the properties that were allotted to Haripada in his share as an additional security for the entire loan of Rs. 30,000 no portion of which benefited the estate of Haripada at all? In our opinion the only object of executing the security bond was to protect Mohini who was threatened with legal proceedings by his creditor for having included a non-existent property in the mortgage bond. Rashmoni certainly acted at the instigation of and for the benefit of Mohini and she might have been actuated by a feeling of maternal affection to save her son from a real or imaginary danger. But by no stretch of imagination could it be regarded as a prudent act on the part of a Hindu female heir which was necessary for the protection of the estate of the last male holder. In our opinion the view taken by the Courts below is quite proper and as a concurrent finding of fact it should not be disturbed by this Court.

The second point urged by Mr. Chatterjee raises the question as to whether the fact of Mohini's joining his mother in executing the security bond would make the transaction binding on the actual reversioner. Mohini being admittedly the presumptive reversioner of Haripada at the date of the transaction. We do not think that there could be any serious controversy about the law on this point. The alienation here was by way of mortgage and so no question of surrender could possibly arise. Mohini being the immediate reversioner who joined in the execution of the security bond must be deemed to have consented to the transaction. Such consent may raise a presumption that the transaction was for legal necessity or that the mortgagor had acted therein after proper and *bona fide* enquiry and has satisfied himself as to the existence of such necessity.¹ But this presumption is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and there has been no proper and *bona fide* enquiry by the mortgagee. There is no doubt that both the Courts below have proceeded on a correct view of law and both have come to the conclusion upon a consideration of the evidence in the case that the presumption that arose by reason of the then reversioner's giving consent to the transaction was rebutted by the facts transpiring in evidence.

Mr. Chatterjee placed considerable reliance upon another document which purports to be a deed of declaration and was executed by Ram Narayan on the 5th of October 1918. At this time Mohini was dead and Ram Narayan was the immediate reversioner to the estate of Haripada and by this deed he declared *inter alia* that the debts contracted by Rashmoni were for proper and legal necessity. This deed purports to be addressed to Bangshidari Ghosh and Keshav Dutt, two other alienees of the properties of Mohini and Haripada and does not amount to a representation made to the auction purchaser Annada Prasad Ghose or to the father of the present appellants. In fact they had not come in the picture at all at that time. At the most it can be regarded only as an admission by a presumptive

¹ Vide *Deb Posing Chowdhury v Colap Gounden v Gounden* (1918) 36 M L J 493 L R Bhagat (1913) 1 L R 40 Cal 721 at 781 (F B) 46 I A 72 84 I L R 42 Mad 523 (P C) Approved of by the Judicial Committee in

reversioner and cannot have any higher value than the consent expressed by Mohini who figured as a co-executant of the security bond. It cannot bind the actual reversioner in any way. Mr Chatterjee attempted to put forward an argument on the authority of certain observations in the case of *Bayrangi v Monokarnika*¹ that as the present appellants are the sons of Ram Narayan the admissions made by their father would bind them as well. It is true that there is a passage at the end of the judgment in *Monokarnika's case*¹ which lends some apparent support to the contention of the learned counsel. The concluding words in the judgment stand as follows:

The appellants who claim through Matadin Singh and Bajnath Singh must be held bound by the consent of their fathers.

But the true import of this passage was discussed by the Privy Council in their later pronouncement in *Rangasami Gounden v Nalappa Gounden*² and it was held that the words referred to above should not be construed to lay down the proposition that such consent on the part of the father would operate *proprio vigore* and would be binding on the sons. This proposition their Lordships observed, was opposed both to principle and authority, it being a settled doctrine of Hindu Law that nobody has a vested right so long as the widow is alive and the eventual reversioner does not claim through anyone who went before him. As the sons of Ram Narayan claim as heirs of Harpada and not of their father the admissions, if any, made by the latter could not in any way bind them. This contention of the appellant must therefore fail.

The third and the last contention raised by Mr Chatterjee is that in any event his client is a stranger who has *bona fide* purchased the property for good consideration after making due enquiries and on proper legal advice and he cannot therefore be affected by any infirmity of title by reason of the absence of legal necessity. In our opinion the contention formulated in this form really involves a misconception of the legal position of an alienee of a Hindu widow's property. The interest of a Hindu widow in the properties inherited by her bears no analogy or resemblance to what may be described as an equitable estate in English law and which cannot be followed in the hands of a *bona fide* purchaser for value without notice. From very early times the Hindu widow's estate has been described as qualified proprietorship with powers of alienation only when there is justifying necessity, and the restrictions on the powers of alienation are inseparable from her estate³. For legal necessity she can convey to another an absolute title to the property vested in her. If there is no legal necessity, the transferee gets only the widow's estate which is not even an indefeasible life estate for it can come to an end not merely on her death but on the happening of other contingencies like re-marriage, adoption, etc. If an alienee from a Hindu widow succeeds in establishing that there was legal necessity for transfer, he is completely protected and it is immaterial that the necessity was brought about by the mismanagement of the limited owner herself. Even if there is no necessity in fact, but it is proved that there was representation of necessity and the alienee after making *bona fide* enquiries satisfied himself as best as he could that such necessity existed, then as the Privy Council pointed out in *Hunooman Persaud Panday's case*⁴ the actual existence of a legal

¹ (1907) LR 35 I.A. 1 I.L.R. 30 All. 1 (P.C.)

² (1918) 35 M.L.J. 493 L.R. 46 I.A. 72 at 83-84 I.L.R. 42 Mad. 523 (P.C.)

³ Vide *The Collector of Masulipatam v Carahy Venkata Narayanaiah* (1861) 8 M.I.A. 529

⁴ (1856) 6 M.I.A. 393

necessity is not a condition precedent to the validity of the sale. The position therefore is that if there is no necessity in fact or if the alienee could not prove that he made *bona fide* enquiries and was satisfied about its existence, the transfer is undoubtedly not void but the transferee would get only the widow's estate in the property which does not affect in any way the interest of the reversioner. In this case the alienation was by way of mortgage. The finding of both the Courts below is that there was no legal necessity which justified the execution of the security bond. The mortgagee also could not prove that there was representation of legal necessity and that she satisfied herself by *bona fide* enquiries that such necessity did exist. On this point the finding recorded by the High Court is as follows —

In the present case there is no scope for an argument that there was such representation of legal necessity or that on *bona fide* enquiry the alienee satisfied herself that there was such a necessity for as I have already pointed out the security bond itself states that it was in consideration of benefit already received and with a view to induce Subasini to forbear from proceeding against Mohini that the bond was being executed. There is no representation in the bond that the alienation was made with a view to securing any benefit to the estate or to avert any danger to the estate or for the purpose of any other legal necessity. Whatever enquiries the appellants may have made would be of no avail to them when the alienation is not binding on the whole estate but only on the woman's estate of Rashmoni.

In our opinion the view taken by the High Court is quite proper. On this finding the security bond could operate only on the widow's estate of Rashmoni and it was that interest alone which passed to the purchaser at the mortgage sale. The subsequent transferee could not claim to have acquired any higher right than what his predecessor had and it is immaterial whether he *bona fide* paid the purchase money or took proper legal advice. The result is that in our opinion the decision of the High Court is right and this appeal must stand dismissed with costs.

Appeal dismissed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT — MEHR CHAND MAHAJAN *Chief Justice*, S. R. DAS, GHULAM HASAN, N. H. BHAGWATI AND B. JAGANNADHADAS, JJ.

The State of Bombay

*Appellant**

Bombay Education Society and others

Respondents

Civil Appeal No. 65 of 1954

The State of Bombay

Appellant

Major Jose Luciano Glennie Pinto and another

Respondents

Civil Appeal No. 66 of 1954

The State of Bombay

Appellant

Dr. Mahadeo Eknath Cujar and another

Respondents

Constitution of India (1950) Articles 29 (2), 30 (1) and 337—Order issued by Bombay Government confining admission to English medium schools to children belonging to the Anglo-Indian and European communities—Valley

On 6th January 1954 the Bombay Government made an order headed "Admissions to Schools teaching through the medium of English."

The operative part of the Order was as follows —

5. Government has accordingly decided as follows

* Civil Appeals Nos. 64, 65 and 66 of 1954

Subject to the exceptions hereinafter provided, no primary or secondary school shall from the date of these orders admit to a class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English, namely, Anglo-Indians and citizens of non Asiatic descent."

A citizen belonging to the Indian Christian community and another who was a member of the Gujrati Hindu community whose children were refused admission to a recognised Anglo-Indian school applied for issue of writs under Article 226 of the Constitution. The Bombay Education Society made a similar application. The High Court accepted the petitions and made an order as prayed for. The State of Bombay appealed to the Supreme Court against the orders.

Held The impugned order offends against the fundamental right guaranteed to all citizens by Article 29 (2) of the Constitution. Ordinarily the word namely imports enumeration of what is comprised in the preceding clause. The expression cannot be construed here as meaning that it is to say 'as merely explanatory or illustrative words and not words either of amplification or limitation. The impugned order restricts admission only to Anglo-Indians and citizens of non Asiatic descent whose language is English. Even assuming however that under the impugned order a section of citizens other than Anglo-Indians and citizens of non Asiatic descent whose language is English, may also get admission, even then, citizens whose language is not English are certainly debarred by the order from admission to a school where English is used as a medium of instruction in all the classes. Article 29 (2) of the Constitution *et facie* puts no limitation or qualification on the expression "citizen" and the order of the Bombay Government will in any event contravene the provisions of Article 29 (2). The right mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. Whatever its objects the effect of the impugned order involves an infringement of the fundamental right and that effect is brought about by denying admission only on the ground of language.

Where a minority like the Anglo-Indian community which is based *inter alia* on religion and language, has the fundamental right to conserve its language script and culture under Article 29 (1) and has the right to establish and administer educational institutions of their choice under Article 30 (1) surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Article 29 (1) and Article 30 (1) of the greater parts of their contents. Such being the fundamental right the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it.

By the second proviso to Article 337, the Constitution has imposed upon the educational institutions run by the Anglo-Indian community, as a condition of such special grant, the duty that at least 40 per cent. of the annual admissions therein must be made available to members of communities other than the Anglo-Indian community. In so far as clause (5) of the impugned order enjoins that no primary or secondary school shall from the date of this order admit to a class where English is used as the medium of instruction any pupil other than the children of Anglo-Indians or of citizens of non Asiatic descent it quite clearly prevents the Anglo-Indian Schools from performing their constitutional obligations and exposes them to the risk of losing the special grant. The impugned order is accordingly unconstitutional.

Appeals under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 15th February, 1954, of the High Court of Judicature at Bombay in Special Applications Nos 259, 288 and 289 of 1954, respectively.

M C Setalvad, Attorney General for India and *C K Daphtary*, Solicitor General for India (*G N Joshi*, *M M Desai*, *Porus A Mehta* and *P. C Gokhale*, Advocates, with him) for Appellant in all the Appeals.

N A Palkhvala, *J B Dadachany*, *J K Munshi* and *Rajinder Narain*, Advocates for Respondents Nos 1 and 2 in CA No 64.

Frank Anthony, *J B Dadachany*, *J K Munshi* and *Rajinder Narain*, Advocates for Respondent No 3.

N. A. Palkhvala, *J B Dadachany*, *J K Munshi* and *Rajinder Narain*, Advocates for Respondent No 1 in CA No 65.

Frank Anthony and Rajinder Narain, Advocates for Respondent No 2

N A Palkhuala, Frank Anthony J B Dadachani, J K Munshi and Rajinder Narain, Advocates for Respondent No 1 in C A No 66

Frank Anthony, J B Dadachani, J K Munshi and Rajinder Narain, Advocates for Respondent No 2

The Judgment of the Court was delivered by

Das, J—These three appeals, filed by the State of Bombay, with a certificate granted by the Bombay High Court are directed against the Judgment and Order pronounced by that High Court on the 15th February, 1954, on three Civil Applications under Article 26. By that Judgment and Order the High Court held that the circular order No SSN 2054 (a) issued by the State of Bombay, Education Department on the 6th January, 1954, was bad in that it contravened the provisions of Article 29 (2) and Article 337 and directed the issue of a writ prohibiting the State from enforcing the order against the authorities of Barnes High School established and run by the Education Society of Bombay (hereinafter referred as the Society)

The Society, which is the first respondent in Appeal No 64 of 1954, is a Joint Stock Company incorporated under the Indian Companies Act, 1913. The other two respondents in that appeal—Ven'ble Archdeacon A S H Johnson and Mrs Glynne Howell are members and directors of the Society. The Ven'ble Archdeacon A S H Johnson is also the Secretary of the Society. Both of them are citizens of India and are members of the Anglo Indian community. The mother tongue of these respondents as of other members of the Anglo Indian community is English.

In the State of Bombay there are in all 1403 secondary schools. 1285 of these schools impart education through the medium of some language other than English. The remaining 118 schools have adopted English as the medium of instruction. Thirty out of these 118 schools are Anglo Indian Schools. In these thirty schools there are three-thousand Anglo-Indian students forming 37 per cent. of the total number of students receiving instruction in those Anglo-Indian Schools. The rest 63 per cent consist of non Anglo-Indian students.

In furtherance of its object the Society in 1925 established and since then has been conducting and running a school known as Barnes High School at Deolali in Nasik District in the State of Bombay. The school is a recognized Anglo Indian School having primary, secondary and high school classes. The School receives considerable aid from the State. The total number of students in the School in December, 1953 was 415, out of which 212 were Anglo-Indians and the remaining 203 belonged to other Indian communities. In all the classes in the said School English is used as the medium of instruction and has been so used since the inception of the School. The entire staff of the School consists of 17 teachers who, with the exception of one, are trained and qualified to teach only in English, the exception being the teacher who teaches Hindi which is the second language taught in that School.

On the 16th December, 1953, the Inspector of Anglo-Indian Schools, Bombay State and Educational Inspector, Greater Bombay, sent a circular letter to the Headmaster of Barnes High School intimating that the Government had under consideration the issue of orders regulating admissions to schools in which the medium of instruction was English. The orders under consideration were stated

to be on the following lines, namely, (1) that from the next school-year admissions to English-medium-school should only be confined to children belonging to the Anglo-Indian and European communities, and (2) that those pupils who, prior to the issue of the orders, were studying in recognized primary or secondary English-medium-schools, could continue to do so. The letter in conclusion advised the Headmaster not to make any admission for the academic year beginning from January, 1954, of pupils other than Anglo Indians or Europeans pending further orders which, it was said, would issue shortly.

The contemplated order came on the 6th January, 1954, in the shape of circular No. SSN 2054 (a) headed 'Admissions to Schools teaching through the medium of English'. In paragraphs 1, 2 and 3 of this circular reference was made to the development of the policy of the Government regarding the medium of instruction at the primary and secondary stages of education. It was pointed out that since 1926-27 the University of Bombay permitted pupils to answer questions in modern Indian languages at the Matriculation examination in all subjects except English and other foreign languages and that this had resulted in 1285 out of 1403 schools in the State ceasing to use English as the medium of instruction. It was then stated that in 1948 instructions were issued to all English teaching schools that admissions to such schools should ordinarily be restricted to pupils who did not speak any of the regional languages of the State or whose mother tongue was English. It was said that in 1951, after a review of the position, a general policy had been laid down to the effect that admission to such schools should be restricted only to four categories of children therein mentioned. Reference was then made to the recommendations of the Secondary Education Commission that the mother tongue or the regional language should generally be the medium of instruction throughout the Secondary school stage, subject to the provision for special facilities for linguistic minorities. In paragraph 4 of the Circular order it was stated that the Government felt that the stage had then been reached for the discontinuance of English as a medium of instruction and that the Government had decided that subject to the facilities to be given to linguistic minorities all special and interim concessions in respect of admission to Schools (including Anglo Indian Schools) using English as the medium of instruction, should thereafter be withdrawn. Then came the operative part of the order, the relevant portion of which is set out below.

5 Government has accordingly decided as follows:

Subject to the exceptions hereinafter provided no primary or secondary school shall from the date of these orders admit to a class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely Anglo-Indians and citizens of non Asiatic descent."

There were three exceptions made to this general order in favour of three categories of students who, prior to the date of the order, were studying through the medium of English. Provision was made for admission of foreign pupils, other than those of Asiatic descent, belonging to foreign possessions in India, to Schools using English as a medium of instruction or to any other school of their choice. The concluding paragraph of the Order was in the following terms —

7 All schools (including Anglo-Indian Schools) using English as a medium of instruction should regulate admissions according to this circular. With a view to facilitating the admission of pupils who under these orders are not intended to be educated through the medium of English these schools are advised to open progressively divisions of Standards using Hindi or an Indian language as the medium of instruction starting from Standard I in 1954. Government will be prepared to consider the payment of additional grant on merits for this purpose.

The above order was followed by another Circular No SSN 2054 (b) issued on the same date drawing the attention of the heads of all Anglo-Indian Schools to the Circular No SSN 2034 (a) of the same date and requesting them to regulate thereafter admissions to their Schools in accordance with that circular. It was stated that the orders in that circular were not intended to affect the total grant available for distribution to Anglo Indian Schools under the Constitution but that the Government would be prepared to consider, in consultation with the State Board of Anglo Indian Education whether in consequence of this order, any change was necessary in the existing procedure for the equitable distribution of the total grant among individual Anglo Indian Schools. In conclusion the attention of the Headmasters was particularly invited to the concluding sentence of paragraph 7 of that circular order and it was pointed out that the grants contemplated therein were intended to be in addition to the grants available under Article 337.

Major Pinto who is a citizen of India belongs to the Indian Christian Community. He claims that his mother tongue, as that of a section of the Indian Christian Community is English and that his entire family speak and use English at home. Two of his sons were then studying in the Barnes High School and were being educated through the medium of English. On 2nd February, 1954, Major Pinto accompanied by his daughter Brenda approached the Headmaster of Barnes High School seeking admission for her to the said School. He was informed by the Headmaster about the order issued by the State of Bombay on the 6th January, 1954, and was told that in view of the said order, the Headmaster was compelled to refuse admission to her since she did not belong to the Anglo Indian Community nor was she of non Asiatic descent, although she had all the necessary qualifications for admission to the said School.

Dr Mahadeo Eknath Gujar is also a citizen of India and is a member of the Gujrati Hindu Community. His mother tongue is Gujrati. He desires that his son Gopal Mahadeo Gujar should become a medical practitioner and go abroad for higher medical studies and qualifications and thought that his son should be educated through the medium of English. He found the Barnes High School, which teaches through the medium of English as suitable for the needs of his son. Accordingly on the 1st February 1954 Dr Gujar accompanied by his son approached the Headmaster of Barnes High School seeking admission for his son to the said School but the Headmaster, in view of the Government Circular Order, felt bound to turn down such request as the boy did not belong to the Anglo Indian Community and was not of non Asiatic descent although he had all the necessary qualifications for admission to the School. There have been similar other applications for admission which have had to be rejected on similar grounds.

Thereupon the Society and Venble Archdeacon A S H Johnson and Mrs Glynne Howell in February, 1954 presented before the High Court of Bombay the Special Civil Application No 259 of 1954 under Article 226 of the Constitution praying for the issue of a Writ in the nature of '*mandamus*' restraining the State of Bombay, its Officers, servants and agents from enforcing the said Order and from taking any steps or proceedings in enforcement of the same and compelling the respondent to withdraw or cancel the said purported order and to allow the petitioner to admit to any standard in the said school any children of non Anglo Indian citizens or citizens of Asiatic descent and to educate them through the medium of English language. Likewise Major Pinto and his daughter Brenda

and Dr Gujar and his son Gopal made similar applications, being Nos 288 and 289 of 1954 respectively, praying for similar reliefs. The three applications were consolidated on 11th February, 1954, and were heard together and were disposed of by the same Judgment and Order pronounced on the 15th February, 1954. The High Court accepted the petitions and made an order as prayed. The State of Bombay has now come up in appeal against the said Orders.

On the facts of these cases two questions arise namely (1) as to the right of students who are not Anglo-Indians or who are of Asiatic descent to be admitted to Barnes High School which is a recognized Anglo Indian School which imparts education through the medium of English, and (2) as to the right of the said Barnes High School to admit non Anglo-Indian Students and students of Asiatic descent. The questions, thus confined to the particular facts of these cases appear to us to admit of a very simple solution as will be presently explained.

Re (1) As already indicated Barnes High School is a recognized Anglo-Indian School which has all along been imparting education through the medium of English. It receives aid out of State funds. The daughter of Major Pinto and the son of Dr Gujar are citizens of India and they claim admission to Barnes High School in exercise of the fundamental right said to have been guaranteed to them by Article 29 (2) of the Constitution. The School has declined to admit either of them in view of the circular order of the State of Bombay. The provisions of the circular order, issued by the State of Bombay on the 6th January, 1954, have already been summarised above. The operative portion of the Order, set forth in clause 5 thereof, clearly forbids all Primary or Secondary Schools, where English is used as a medium of instruction, to admit to any class any pupil other than a pupil belonging to a section of citizens, the language of which is English namely Anglo-Indians and citizens of non Asiatic descent. The learned Attorney General contends that this clause does not limit admission only to Anglo-Indians and citizens of non Asiatic descent, but permits admission of pupils belonging to any other section of citizens the language of which is English. He points out that one of the meanings of the word "namely" as given in Oxford English Dictionary, Volume VII, page 16 is "that is to say" and he then refers us to the decision of the Federal Court in *Bhola Prasad v The King Emperor*¹ where it was stated that the words "that is to say" were explanatory or illustrative words and not words either of amplification or limitation. It should, however, be remembered that those observations were made in connection with one of the Legislative heads, namely entry No. 31 of the Provincial Legislative List. The fundamental proposition enunciated in *The Queen v Burah*² was that Indian Legislatures within their own sphere had plenary powers of legislation as large and of the same nature as those of Parliament itself. In that view of the matter every entry in the legislative list had to be given the widest connotation and it was in that context that the words "that is to say", relied upon by the learned Attorney-General, were interpreted in that way by the Federal Court. To do otherwise would have been to cut down the generality of the legislative head itself. The same reason cannot apply to the construction of the Government order in the present case for the considerations that applied in the case before the Federal Court have no application here. Ordinarily the word "namely" imports enumeration of what is comprised in the preceding clause.

¹ (1942) 2 M L J 6 (1942) F L J 17
(1942) F C R 17 at 25 (F C)

² L R (1878) 3 A C 859 L R 5 I A.
178 I L R 4 Cal 172 (P C.)

In other words it ordinarily serves the purpose of equating what follows with the clause described before. There is good deal of force, therefore, in the argument that the order restricts admission only to Anglo Indians and citizens of non Asiatic descent whose language is English. This interpretation finds support from the decision mentioned in clause 4 to withdraw all special and interim concessions in respect of admission to Schools referred to in clause 4. Facilities to linguistic minorities provided for in the circular order, therefore, may be read as contemplating facilities to be given only to the Anglo-Indians and citizens of non Asiatic descent.

Assuming however, that under the impugned order a section of citizens, other than Anglo Indians and citizens of non Asiatic descent, whose language is English may also get admission even then citizens, whose language is not English, are certainly debarred by the order from admission to a School where English is used as a medium of instruction in all the classes. Article 29 (2) *ex facie* puts no limitation or qualification on the expression 'citizen'. Therefore, the construction sought to be put upon clause 5 does not apparently help the learned Attorney General for even on that construction the order will contravene the provisions of Article 29 (2).

The learned Attorney General then falls back upon two contentions to avoid the applicability of Article 29 (2). In the first place he contends that Article 29 (2) does not confer any fundamental right on all citizens generally but guarantees the rights of citizens of minority groups by providing that they must not be denied admission to educational institutions maintained by the State or receiving aid out of State funds on grounds of religion, race, caste language or any of them and he refers us to the marginal note to the Article. This is certainly a new contention put forward before us for the first time. It does not appear to have been specifically taken in the affidavits in opposition filed in the High Court and there is no indication in the judgment under appeal that it was advanced in this form before the High Court. Nor was this point specifically made a ground of appeal in the petition for leave to appeal to this Court. Apart from this the contention appears to us to be devoid of merit. Article 29 (1) gives protection to any section of the citizens having a distinct language script or culture by guaranteeing their right to conserve the same. Article 30 (1) secures to all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Now suppose the State maintains an educational institution to help conserving the distinct language script or culture of a Section of the citizens or makes grants in aid of an educational institution established by a minority community based on religion or language to conserve their distinct language script or culture, who can claim the protection of Article 29 (2) in the matter of admission into any such institution? Surely the citizens of the very section whose language script or culture is sought to be conserved by the institution or the citizens who belong to the very minority group which has established and is administering the institution, do not need any protection against themselves and therefore Article 29 (2) is not designed for the protection of this Section or this minority. Nor do we see any reason to limit Article 29 (2) to citizens belonging to a minority group other than the section or the minorities referred to in Article 29 (1) or Article 30 (1), for the citizens, who do not belong to any minority group may quite conceivably need this protection just as much as the citizens of such other minority groups. If it is urged, that the citizens of the majority group are amply protected by Article

15 and do not require the protection of Article 29 (2), then there are several obvious answers to that argument. The language of Article 29 (2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of Article 29 (2) extends against the State or anybody who denies the right conferred by it. Further Article 15 protects all citizens against discrimination generally but Article 29 (2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place Article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29 (2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination. The heading under which Articles 29 and 30 are grouped together—namely Cultural and Educational Rights—is quite general and does not in terms contemplate such differentiation. If the fact that the institution is maintained or aided out of State funds is the basis of this guaranteed right then all citizens, irrespective of whether they belong to the majority or minority groups, are alike entitled to the protection of this fundamental right. In view of all these considerations the marginal note alone, on which the Attorney General relies, cannot be read as controlling the plain meaning of the language in which Article 29 (2) has been couched. Indeed in *The State of Madras v Srimathi Champakam Dorairajan*¹ this Court has already held as follows:

It will be noticed that while clause (1) protects the language script or culture of a section of the citizens clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. In our judgment this part of the contention of the learned Attorney-General cannot be sustained.

The second part of the arguments of the learned Attorney-General hinges upon the word "only" to be found in Article 29 (2). His contention is that the impugned order does not deny admission to any citizen on the ground *only* of religion, race, caste, language or any of them. He maintains with considerable emphasis that it is incumbent on the State to secure the advancement of Hindi which is ultimately to be our National language and he stresses the desirability of or even the necessity, generally acknowledged by educationalists for imparting education through the medium of the pupil's mother tongue. We have had equally emphatic rejoinder from learned counsel appearing for the different respondents. Characterising the impugned circular as an unwarranted and wanton encroachment on the liberty of the parents and guardians to direct the education and upbringing of their children and wards reliance has been placed on the following observations of McReynolds, J., in *Pierce v Society of Sisters of Holy Names*² —

¹ (1951) 1 M.L.J. 621 (1951) S.C.J. 313
(1951) 2 S.C.R. 525 at 530 (S.C.)

² 268 U.S. 508 69 L.Ed. 1070 at 1078

* The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State, those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

It is also urged that the main, if not the sole, object of the impugned order is to discriminate against, and if possible to stifle the language of the Anglo-Indian Community in utter disregard of the constitutional inhibition. It is pointed out that to compel the Anglo-Indian Schools to open parallel classes in any Indian language will not necessarily facilitate the advancement of the Hindi language for the language adopted for such parallel classes may not be Hindi. Further the opening of parallel classes in the same school with an Indian language as the medium of instruction while the pupils in the other classes are taught in English will certainly not be conducive to or promote the conservation of the distinct language, script or culture which is guaranteed by Article 29 (1) to the Anglo Indian Community as a section of the citizens. It is equally difficult, it is said, to appreciate why the salutary principle of imparting education through the medium of the pupil's mother tongue should require that a pupil whose mother tongue is not English but is, say, Gujrati, should be debarred from getting admission only into an Anglo-Indian School where the medium of instruction is English but not from being admitted into a School where the medium of instruction is a regional language, say Konkani, which is not the mother tongue of the pupil. The rival arguments thus formulated on both sides involve questions of State policy on education with which the Court has no concern. The American decisions founded on the 14th Amendment which refers to due process of Law may not be quite helpful in the interpretation of our Article 29. We must, therefore, evaluate the argument of the learned Attorney General on purely legal considerations bearing on the question of construction of Article 29 (2).

The learned Attorney General submits that the impugned Order does not deny to pupils who are not Anglo-Indians or citizens of non-Asiatic descent, admission into an Anglo Indian School only on the ground of religion, race, caste, language or any of them but on the ground that such denial will promote the advancement of the national language and facilitate the imparting of education through the medium of the pupil's mother tongue. He relies on a number of decisions of the High Courts, e.g., *Yusuf Abdul Aziz v State*¹, *Sm Anyali Roy v State of West Bengal*², *The State of Bombay v Narasu Appa Mali*³, *Srinivasa Ayyar v Saraswathi Ammal*⁴, and *Dattaraya Motiram More v State of Bombay*⁵. These decisions, it should be noted, were concerned with discrimination prohibited by Article 15 which deals with discrimination generally and not with denial of admission into educational institutions of certain kinds prohibited by Article 29 (2). It may also be mentioned that this Court upheld the actual decision in the first mentioned Bombay case not on clause (1) but on clause (3) of Article 15. These cases, therefore, have no direct bearing on Article 29 (2). The arguments advanced by the learned Attorney General overlook the distinction between the object or motive underlying the impugned order and the mode and manner adopted therein for achieving that object. The object or motive attributed by the learned Attorney-

1 A I R 1951 Bom 470 53 Bom L R 736 4 (1951) 2 M L J 649 A I R 1952 Mad
2 A I R 1952 Cal 825 193
3 A I R 1952 Bom 84 5 A I R 1953 Bom 311

General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by Article 29 (2). A similar question of construction arose in the case of *Punjab Province v. Daulat Singh*¹. One of the question in that case was whether the provision of the new section 13-A of the Punjab Alienation of Land Act was *ultra vires* the Provincial Legislature as contravening sub-section (1) of section 298 of the Government of India Act, 1935, in that in some cases that section would operate as a prohibition on the ground of descent alone. Beaumont, J., in his dissenting judgment took the view that it was necessary for the Court to consider the scope and object of the Act which was impugned so as to determine the ground on which such Act was based, and that if the only basis of the Act was discrimination on one or more of the grounds specified in section 298, sub-section (1) then the Act was bad but that if the true basis of the Act was something different the Act was not invalidated because one of its effects might be to invoke such discrimination. In delivering the judgment of the Board Lord Thankerton at page 74 rejected this view in the words following

Their Lordships are unable to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in section 298, sub-section 1, but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section and while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable will not obviate the prohibition of sub section 1'. Granting that the object of the impugned order before us was what is claimed for it by the learned Attorney-General, the question still remains as to how that object has been sought to be achieved. Obviously that is sought to be done by denying to all pupils, whose mother tongue is not English, admission into any school where the medium of instruction is English. Whatever the object the immediate ground and direct cause for the denial is that the mother tongue of the pupil is not English. Adapting the language of Lord Thankerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29 (2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language. The same principle is implicit in the decision of this Court in *The State of Madras v. Srimathi Champakam Dorairajan*². There also the object of the impugned Communal G.O. was to advance the interests of educationally backward classes of citizens but, that object notwithstanding, this Court struck down the order as unconstitutional because the *modus operandi* to achieve that object was directly based only on one of the forbidden grounds specified in the Article. In our opinion the impugned order offends against the fundamental right guaranteed to all citizens by Article 29 (2).

Re 2—Coming to the second question as to whether the impugned order infringes any constitutional right of Barnes High School, the learned Attorney-General contends that although any section of the citizens having distinct language, script or culture of its own, has under Article 29 (1) the right to conserve the same and although all minorities, whether based on religion or language, have, under

¹ (1946) 1 M.L.J. 426 (1946) L.R. 73 ² (1951) 1 M.L.J. 621 (1951) S.C.J. 313
1 A 59 (1946) F.L.J. 41 (P.C.) (1951) 2 S.C.R. 525 at 530 (S.C.)

Article 30 (1), the right to establish and administer educational institutions of their choice, nevertheless such sections or minorities cannot question the power of the State to make reasonable regulations for all schools including a requirement that they should give instruction in a particular language which is regarded as the national language or to prescribe a curriculum for institutions which it supports. Undoubtedly the powers of the State in this behalf cannot be lightly questioned and certainly not in so far as their exercise is not inconsistent with or contrary to the fundamental rights guaranteed to the citizens. Indeed in the cases of *Robert T. Meyer v State of Nebraska*¹ and *August Bartels v State of Iowa*², the Supreme Court of the United States definitely held that the State's Police power in regard to education could not be permitted to override the liberty protected by the 14th Amendment to the Federal Constitution. That is how those cases have been understood by writers on American Constitutional Law. [See Cooley's Constitutional Limitations Volume II, page 1345 and Willis, page 64] The statutes impugned in these cases provided

(1) That no person should teach any subject to any person in any language other than the English language and

(2) That languages other than English may be taught only after the pupil had passed the 8th grade

A contravention of those two sections was made punishable. In the first mentioned case only the first part of the prohibition was challenged and struck down and in the second case both the provisions were declared invalid. The learned Attorney-General informed us that in 29 States in U S A Legislation had made compulsory provision for English as the medium of instruction. Those statutes do not appear to have been tested in Court and the Attorney-General cannot, therefore, derive much comfort from the fact that 29 States have by legislation adopted English as the medium of instruction. The learned Attorney-General also relies on the case of *Ottawa Separate Schools Trustees v Mackell*³. That case does not help him either, because in that case the schools were classified as denominational purely on the ground of religion. They were not classified according to race or language. It was contended that the kind of school that the trustees were authorised to provide, was the school where education was to be given in such language as the trustees thought fit. Their Lordships of the Judicial Committee rejected this contention with the following observations —

' Their Lordships are unable to agree with this view. The 'kind' of school referred to in sub-section 8 of section 79 is in their opinion the grade or character of school, for example, "a girls' school", "a boys' school" or "an infants' school" and a 'kind' of school, within the meaning of that sub-section is not a school where any special language is in common use.

Where, however, a minority like the Anglo-Indian Community, which is based, *inter alia*, on religion and language, has the fundamental right to conserve its language, script and culture under Article 29 (1) and has the right to establish and administer educational institutions of their choice under Article 30 (1), surely then there must be implicit in such fundamental right, the right to impart instruction in their own institutions to the children of their own Community in their own language. To hold otherwise will be to deprive Article 29 (1) and Article 30 (1) of the greater parts of their contents. Such being the fundamental right, the police

1 262 U S 390 67 Law Ed 1042

2 262 U S 404 67 Law Ed 1047

3 LR (1917) A C 62

power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it.

We now pass on to Article 337 which is in Part XVI under the heading Special Provisions relating to certain classes. Article 337 secures to the Anglo-Indian Community, to certain special grants made by the Union and by each State in respect of education. The second paragraph of that Article provides for progressive diminution of such grant until such special grant ceases at the end of ten years from the commencement of the Constitution as mentioned in the first proviso to that Article. The second proviso runs as follows —

Provided further that no educational institution shall be entitled to receive an grant under this Article unless at least forty per cent of the annual admissions therein are made available to members of communities other than the Anglo-Indian Community.

It is clear, therefore, that the Constitution has imposed upon the educational institution run by the Anglo Indian Community as a condition of such special grant, the duty that at least 40 per cent of the annual admissions therein must be made available to members of communities other than the Anglo-Indian Community. This is undoubtedly a constitutional obligation. In so far as clause 5 of the impugned order enjoins that no primary or secondary school shall from the date of this order admit to a class where English is used as the medium of instruction any pupil other than the children of Anglo Indians or of citizens of non-Asiatic descent it quite clearly prevents the Anglo-Indian schools including Barnes High School from performing their constitutional obligations and exposes them to the risk of losing the special grant. The learned Attorney General refers to clause 7 of the impugned order and suggests that the authorities of the Anglo-Indian Schools may still discharge their constitutional obligations by following the advice given to them in that concluding clause. The proviso to Article 337 does not impose any obligation on the Anglo Indian Community as a condition for receipt of the special grant other than that at least 40 per cent of the annual admissions should be made available to non Anglo Indian pupils. The advice, tendered by the State to the Anglo-Indian Schools by clause 7 of the impugned order, will if the same be followed necessarily impose an additional burden on the Anglo Indian Schools to which they are not subjected by the Constitution itself. The covering circular No SSN 2054 (b) which was issued on the same day throws out the covert hint of the possibility in consequence of the impugned order of some change becoming necessary in the existing procedure for the equitable distribution of the total grant among Anglo Indian schools although the impugned order was not intended to affect the total grant available for distribution to Anglo Indian Schools under the Constitution. If in the light of the covering circular clause 7 is to be treated as operative in the sense that a non-compliance with it will entail loss of the whole or part of this grant as a result of the change in the existing procedure for the equitable distribution then it undoubtedly adds to Article 337 of the Constitution a further condition for the receipt by Anglo-Indian Schools of the special grant secured to them by that Article. On the other hand, if clause 7 is to be treated merely as advice which may or may not be accepted or acted upon then clause 5 will amount to an absolute prohibition against the admission of pupils who are not Anglo-Indians or citizens of non Asiatic descent into Anglo-Indian Schools and will compel the authorities of such Schools to commit

a breach of their constitutional obligation under Article 337 and thereby forfeit their constitutional right to the special grants. In either view of the matter the impugned order cannot but be regarded as unconstitutional. In our opinion, the second question raised in these appeals must also, in view of Article 337, be answered against the State

The result of the foregoing discussion is that these appeals must be dismissed and we order accordingly. The State must pay the costs of the respondents

Appeal dismissed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, Chief Justice, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Srinathi Ashalata Debi & Others

Appellants

Sri Jadu Nath Roy & Others

Respondents.

Ilizit 141 p 1122 (Legal Proceedings) Order, 1947—Paragraph 4 (2)—Applicability—Application for re restoration of properties by the mortgage purchasers on default in payment of instalments ordered under the decree passed under the Bengal Money-lenders Act (X of 1940)—Order, dated 27th September, 1947, holding that there was no default—Appal to Calcutta High Court allowed on 27th April, 1950, holding that there was default and ordering restoration of properties—Bulk of the properties in Pakistan—Effect on jurisdiction of Calcutta High Court

On a petition by the mortgagors under section 36 of the Bengal Money lenders Act (X of 1940) for reopening of the mortgage-decree and personal decree a new decree was passed on 10th May, 1943 for a sum of money which was directed to be paid by the judgment-debtors to the decree-holders in fifteen equal annual instalments. Restoration of the properties purchased by the decree-holders to the judgment-debtors was also ordered. The High Court affirmed the decree. Possession was delivered to the mortgagors on the 5th October, 1944. The mortgagors made applications to the Court of the Subordinate Judge at Alipore on 6th September 1946 and 18th April, 1947 asking for re restoration of the properties alleging defaults in the payment of the instalments due under the decree. The Subordinate Judge rejected these applications by his order, dated the 27th September, 1947, holding that there was no default. An appeal was preferred to the High Court of Calcutta and was allowed on 27th April, 1950. The High Court held that a default had been committed by the mortgagors and ordered re restoration of the properties. On appeal to the Supreme Court, it was contended that the bulk of the properties which were the subject matter of the new decree had gone to Pakistan after the 26th January, 1950, being situated in East Pakistan and the High Court at Calcutta had after the 26th January 1950, no jurisdiction and power to determine the appeal and to pass an order relating to the immovable properties situated in foreign territories. It was further urged that the order of re restoration was not appealable. Negating these contentions

Held By reason of the fact that these proceedings were pending in the Subordinate Judge's Court at Alipore on 15th August, 1947, the High Court of Calcutta which had appellate or revisional jurisdiction over that Court was prescribed to be the Court in which the appeal or the application for revision in respect of such proceedings would lie, because the Subordinate Judge's Court at Alipore was treated as the Court in which such proceedings could and should have been instituted after the 15th August, 1947. *Vide* paragraph 4 (2) of the Indian Independence (Legal Proceedings) Order, 1947. So it cannot be contended that the High Court at Calcutta had no jurisdiction to determine the appeal.

The applications for re restoration of the properties to the mortgagors must be treated as applications for execution and orders on such applications for execution are appealable.

The appeal being a mere rehearing the appellate Court was entitled to review the judgment of the trial Judge and declare that it was wrong and that the decree-holder was entitled to re restoration.

ration. The question whether he would be able to obtain possession of the immovable properties was in fact foreign to such an enquiry. By appropriate proceedings in another jurisdiction he may be able to do so, but this difficulty could not be a deterrent to the High Court passing the necessary orders for re-restoration of the properties.

On Appeal from the Judgment and Decree, dated the 27th April, 1930, of the High Court of Judicature at Calcutta (Sen and Chunder, JJ) in Appeal from Original Decree, No 19 of 1918, arising out of the Judgment and Decree dated the 27th September, 1917, of the Court of the Subordinate Judge, Third Court of Zillah 24-Parganas at Alipore in Miscellaneous Judicial Case No 31 of 1917

Saktinath Ghose, Advocate, for the Appellants

Bartim Chandra Banerji and *R R Biswas*, Advocates, for the Respondents Nos. 1, 2, 8 and 9

The Judgment of the Court was delivered by

Bhagwati, J—This is an appeal against the Judgment and Decree of the High Court of Judicature at Calcutta reversing the order of the Third Subordinate Judge, Alipore, dismissing the Respondents' applications for re-restoration of certain immovable properties

One Romesh Chandra Acharya Choudhury (deceased) predecessor-in interest of the Appellants borrowed on the 16th August 1918, Rs 1 60 000 and Rs 75,000 from the predecessors in-interest of the Respondents under two deeds of mortgage. There being default in payment of the mortgage amounts a suit to realise the mortgage securities was filed on the 10th March 1926 in the Third Subordinate Judge's Court, Alipore. A preliminary mortgage-decree for Rs 4,21 851 1-6 was passed on the 4th April, 1929 and a decree absolute for sale was passed on the 13th September, 1929. The mortgaged properties were put up for sale in execution proceedings in 1930 and the decree holders purchased the properties at auction sales on the 29th February, 1932 and the 23rd April, 1935 for an aggregate amount of Rs 2 35 200. These sales were duly confirmed and the auction purchasers took delivery of possession of different items of property on different dates between the 25th June, 1933 and the 9th March, 1936. The decree-holders obtained on the 13th December, 1937 a personal decree under Order 34, Rule 6 of the Civil Procedure Code for the balance due to them, viz, Rs 3 30 903. This personal decree was also executed and some properties of the mortgagors were purchased by the decree-holders on the 8th August 1939 for Rs 3,899 and delivery of possession of these properties was duly given to them on the 6th July, 1940.

Kshatish Chandra Acharya Choudhury, since deceased, the predecessor in interest of the Appellants Nos. 1 to 3 and Jyoush Chandra Acharya Choudhury, the Appellant No. 4, sons of the mortgagor filed on the 9th December, 1940, a petition under section 36 of the Bengal Money-lenders Act (Act X of 1940) for reopening the mortgage-decree and the personal decree. By an order, dated the 25th August, 1941, the learned Subordinate Judge reopened the decrees and on the 10th May, 1943, passed a new decree for a sum of Rs. 3,76,324-12-4. The said sum was directed to be paid by the judgment-debtors to the decree holders in fifteen equal annual instalments. He also directed the restoration of the properties purchased by the decree-holders.

The present Respondents preferred, on the 19th June, 1943, an appeal to the High Court of Judicature at Calcutta and cross-objections were filed by the said Kshatish Chandra Acharya Choudhury and Appellant No. 4. By their Judgment

ment and Decree, dated the 29th June, 1944, the High Court affirmed the decree of the Court below with some substantial variations and passed a new decree in favour of the mortgagors. The mortgagees were ordered to put the mortgagors in possession of all the properties they had purchased in execution of the reopened decrees and render to them an account of the mesne profits of those properties from the 15th September, 1941 till they restored or relinquished possession to the mortgagors of the collection papers of those properties. The sum of Rs. 3,76,324-12-6 was declared to be due by the mortgagors to the mortgagees and the mortgagors were to pay the same in twenty equal annual instalments the first of such instalments to be paid on or before the first anniversary of the date on which the mortgagees restored or relinquished possession of all the properties purchased by them in execution to the mortgagors or of the date on which they delivered to the mortgagors the collection papers as therein mentioned, whichever date was later. The mortgagors were to pay to the mortgagees the successive annual instalments on or before the same date of the succeeding years on which the first instalment became payable and they were also to pay the annual revenue of the aforesaid properties that would become payable after they were restored to possession kist by kist, as they fell due, at least three days before the kist dates and file the challans in the Court below in proof of payment within ten days of the payments. The road, public works and education cesses and rent due to the superior landlords were also to be paid similarly by the mortgagors and in default of payment of any one instalment or cesses or rent within the time prescribed, the mortgagees were entitled to get back possession of the said properties from the mortgagors and in that event the sum of Rs. 2,39,099 at which the mortgagees had purchased those properties would be balanced against the amount then due to them under the decree. If thereafter any amount still remained due to the mortgagees under the decree they were entitled to apply in the Court below for a decree for the balance under Order 34, Rule 6, of the Civil Procedure Code. An inquiry was ordered into the mesne profits for the period between the 15th September, 1941, till the restoration of possession to the mortgagors and the mortgagors were at liberty to set off the amount that might be decreed in their favour for mesne profits towards the instalment that fell due in the year in which the amount was declared by the Court below and the next succeeding years till the said amount was wiped off.

Possession was delivered to the mortgagors on the 5th October, 1944. The delivery of the collection papers was, however, given on the 28th March, 1945. The mortgagors were alleged to have committed default in the payment of the second instalment which was due in any event on the 28th March, 1947 and also in the payment of the revenue kist and the cesses which were due on or about that date. The mortgagees therefore made applications in the Court of the Third Subordinate Judge at Alipore on the 6th September, 1946 and the 18th April, 1947, asking for re restoration of the properties. Several defaults were alleged but only two defaults were pressed, one in regard to the payment of the second instalment which was due on the 28th March, 1947 and the other in regard to the payment of the revenue and the cesses of the Noakhali properties due also on the same date. The learned Subordinate Judge rejected these applications by his order, dated the 27th September, 1947, holding that there was no default in the payment of revenue and cess and that the default in payment of the second

instalment though it had accrued was due to the wrongful acts of the decree-holders themselves and that the decree-holders were not entitled to take advantage of their own wrong. An appeal was preferred to the High Court of Judicature at Calcutta. The appeal was allowed on the 27th April, 1950. The High Court held that a default had been committed by the mortgagors and ordered re-restoration of the properties. This appeal has been filed against that order of the High Court with certificate under Article 133 (1) (a) of the Constitution.

Shri S. Ghosh, appearing for the Appellants before us, urged that the bulk of the properties which were the subject-matter of the new decree had gone to Pakistan after the 26th January, 1950, being situated in East Pakistan and the High Court at Calcutta had after the 26th January, 1950, no jurisdiction and power to determine the appeal and to pass an order relating to the immovable properties situated in foreign territories. He further urged that the order of re-restoration of the properties was not appealable and that in any event no default had been committed by the mortgagors.

In support of his first contention reliance was placed on Paragraph 4 (2) of the Indian Independence (Legal Proceedings) Order, 1947, which ran as under —

"4. Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947

(2) Any appeal or application for revision in respect of any proceedings so pending in any such Court shall lie in the Court which would have appellate, or as the case may be, revisional jurisdiction over that Court if the proceedings were instituted in that Court after the appointed day."

The applications for re-restoration of the properties were pending before the Third Subordinate Judge at Alipore on the 15th August, 1947 and they were saved by the provisions of Paragraph 4 (1) which provided for the continuance in the same Court of these proceedings as if the said Act that is, Indian Independence Act, 1947, had not been passed. But he contended that Paragraph 4 (2) did not save the appeal which had been filed by the mortgagees after the 15th August, 1947. We cannot accept this contention of the Appellant. Paragraph 4 (2) provided for appeals or applications for revision in respect of proceedings which were pending in the Courts after the 15th August, 1947 and laid down that these proceedings by way of appeal or applications for revision could lie in the Courts which would have appellate or revisional jurisdiction over that Court if the proceedings were instituted in that Court after the 15th August, 1947. It was contended that for the purpose of this provision the words "if the proceedings were instituted in that Court" should be read as meaning "if the proceedings could have been instituted in that Court". This certainly could not be the meaning, because by reason of the transfer of the territories no proceedings in respect of the properties which had gone to Pakistan could ever have been maintained after the 15th August, 1947, in the Courts concerned. The only construction which could be put upon this provision was that the Court having appellate or revisional jurisdiction over that Court would have such jurisdiction as if the proceedings had been instituted in that Court after the 15th August, 1947. For the purpose of the appellate or the revisional jurisdiction that Court had to be treated as the Court in which the proceedings could and should have been instituted and it goes without saying that if the proceedings could be treated as having been properly instituted in that Court the only Court to which the appeal or the application for revision could lie

was the Court which then had appellate or revisional jurisdiction over that Court. In the case before us no proceedings could have been instituted in the Third Subordinate Judge's Court at Alipore in respect of the properties which had gone to East Pakistan after the 15th August 1947. But by reason of the fact that these proceedings were pending in that Court on the 15th August, 1947, the High Court of Calcutta which had appellate or revisional jurisdiction over that Court was prescribed to be the Court in which the appeal or the application for revision in respect of such proceedings would lie, because that Court that is the Third Subordinate Judge's Court at Alipore was treated as the Court in which such proceedings could and should have been instituted after the 15th August, 1947.

Learned counsel for the Respondents drew our attention to the case of *Tirlok Nath v. Moti Ram & Others*¹. In that case a suit for possession of land at place A was filed in Court at B in 1943. On the 15th August, 1947, the suit was pending before the Court at B which dismissed the suit in 1948. An appeal from the decision was filed in the East Punjab High Court as the place B was included in the East Punjab. On objection regarding jurisdiction of the High Court being taken on the ground that the land in suit was at A, now included in Pakistan, the High Court held that the suit being pending at place B on 15th August, 1947, appeal from the decision of that Court lay to the East Punjab High Court and not to Lahore High Court under Paragraph 4 (2) of the Indian Independence (Legal Proceedings) Order, 1947. This decision is on all fours with the case before us and we are of the opinion that the contention urged on behalf of the Appellants is untenable.

The next contention of the Appellants is equally untenable. The Calcutta High Court considered these applications as applications in the suit for a special remedy given under a special law and held that the rules of the Code of Civil Procedure applied and an appeal lay against the orders because they were decrees within the definition of section 2 (2) of the Civil Procedure Code. We cannot accept this reasoning. These applications were in truth and in substance applications for execution of the new decree which had been passed in favour of the mortgagors by the High Court on the 29th June, 1944. The only thing competent to the mortgagees under the terms of the new decree was to apply for executions of the decree on default committed by the mortgagors and the applications made by the mortgagees in the Court of the Third Subordinate Judge at Alipore were really applications for execution of the decree though not couched in the proper form and could be treated as such. If they were treated as such it is clear that the orders passed on such applications for execution were appealable and no objection could be sustained on the ground that no appeals lay against these orders. Treating these applications therefore as applications for execution we see no substance in this contention of the Appellants.

If the matter is approached in this way no objection could be urged by the Appellants against the decision of the High Court. The executing Court could not go behind the decree and it is clear on the facts that default was committed by the mortgagors both in regard to the payment of the revenue and the cess as also the second instalment under the new decree.

The contention which was therefore urged on behalf of the Appellants that there was no default committed by the mortgagors also could not be sustained.

The High Court of Judicature at Calcutta was therefore rightly seized of the appeal and it had jurisdiction to decide whether the mortgagors had committed default in carrying out the terms of the new decree. The appeal being a mere rehearing the appellate Court was entitled to review the judgment of the trial Judge and declare that it was wrong and that the decree holder was entitled to re-restoration. The question whether he would be able to obtain possession of the immovable properties in fact was foreign to such an enquiry. By appropriate proceedings in another jurisdiction he may be able to do so, but this difficulty could not be a deterrent to the High Court passing the necessary orders for re-restoration of the properties.

The appeal therefore fails and must stand dismissed. There will be no order as to costs.

Appeal dismissed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHR CHAND MALHAIJI *Chief Justice*, B. K. MUKHERJEA, VIVIAN BOSE, N. H. BHAGWATI AND T. L. VENKATARAMA AYYAR, JJ

T. C. Basappa

*Appellant**

T. Nagappa and another

Respondents

Constitution of India (1950) Articles 225 and 226—Scope—Interference by issuing writs of certiorari—Grounds—Decision of Election Tribunal—When can be quashed by writ of certiorari

The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or decrees including writs in the nature of *habeas corpus*, *mandamus*, *prohibition* and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts for other purposes as well. In view of the express provisions of our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor of the opposition by any difference of opinion expressed in particular cases by English Judges.

One of the fundamental principles in regard to the issuing of a writ of *certiorari* is that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts.

The second essential feature of a writ of *certiorari* is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in appellate but supervisory capacity. In granting a writ of *certiorari* the superior Court does not exercise the powers of an appellate tribunal. It does not review or re-weigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person.

Certiorari may and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances. When the jurisdiction of the Court depends upon the existence of a collateral fact, the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess.

A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed it may violate the principles of natural justice. A writ of *certiorari* may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a manifest error apparent on the face of the proceedings e.g., when it is based on clear ignorance or disregard of the provisions of the law.

In the circumstances of the instant case it was found that the Judges of the Mysore High Court were not right in holding that sufficient and proper grounds existed for the issue of *certiorari* and the writ issued by the High Court quashing the proceedings of the Election Tribunal was therefore vacated.

Appeal from the Judgment and Order, dated the 11th January, 1954, of the High Court of Judicature of Mysore in Civil Petition No. 29 of 1953 quashing the order of the Election Tribunal, Shimoga, dated the 15th January, 1953, in Shimoga Election case No. 1 of 1952-53.

K. S. Krishnaswami Iyengar Senior Advocate, *K. S. Venkataranga Iyengar*, and *M. S. K. Iyengar*, Advocates, for Appellant.

Dr. Bakshi Tek Chand Senior Advocate, *R. Ganapathy Iyer* and *M. S. K. Sastri* Advocates with him, for Respondent No. 1.

G. K. Daphtry, Solicitor General for India, *Jindra Lal*, *Porus A. Mehta* and *P. G. Gokhale* Advocates with him, for Respondent No. 3.

The Judgment of the Court was delivered by

Mukherjee, J.—This appeal is directed against a Judgment of a Division Bench of the Mysore Court, dated the 11th January, 1954 by which the learned Judges granted an application, presented by the respondent No. 1 under Article 226 of the Constitution, and directed a writ of *certiorari* to issue quashing the proceedings and order of the Election Tribunal, Shimoga, dated the 15th January, 1953, in Shimoga Election Case No. 1 of 1952-53.

The facts material for purposes of this appeal may be briefly narrated as follows. The appellant and respondent No. 1 as well as eight other persons, who figured as respondents 2 to 9 in the proceeding before the High Court, were duly nominated candidates for election to the Mysore Legislative Assembly from Tarikere Constituency at the general election of that State held in January, 1952. Five of these nominated candidates withdrew their candidature within the prescribed period and the actual contest at the election was between the remaining five candidates including the appellant and respondent No. 1. The polling took place on the 4th January, 1952 and the votes were counted on the 26th of January following. As a result of the counting the respondent No. 1 was found to have secured 8,093 votes which was the largest in number and the appellant followed him closely having obtained 8,059 votes. The remaining three candidates, who were respondents 2, 3 and 4 before the High Court, got respectively 6,239, 1,644 and 1,142 votes. The Returning Officer declared the respondent No. 1 to be the successful candidate and this declaration was published in the *Mysore Gazette* on the 11th February, 1952. The respondent No. 1 lodged his return of election expenses with the necessary declaration some time after that and notice of this return was published on the 31st March, 1952. The appellant thereafter filed a petition before the Election Commission, challenging the validity of the election, *inter alia* on the grounds that there was violation of the election rules in regard to certain matters and that the respondent No. 1 by himself or through his agents were guilty

of a number of major corrupt practices which materially affected the result of the election. The petitioner prayed for a declaration that the election of respondent No. 1 was void and that he himself was duly elected. This petition, which bears date, 10th of April, 1952, was sent by registered post to the Election Commission and was actually received by the latter on the 14th of April following. The Election Commission referred the matter for determination by the Election Tribunal at Shimoga and it came up for hearing before it on the 23rd of October, 1952. On that date the appellant filed an application for amendment of the petition, heading it as one under Order 6 Rule 17 of the Civil Procedure Code and the only amendment sought for, was a modification of the prayer clause by adding a prayer for declaring the entire election to be void. It was stated at the same time that in case this relief could not be granted the petitioner would, in the alternative pray for the relief originally claimed by him namely that the election of respondent No. 1 should be declared to be void and the petitioner himself be held to be the elected candidate at the election. Despite the objection of respondent No. 1, the Tribunal granted this prayer for amendment. The hearing of the case then proceeded and on the averments made by the respective parties, as many as 27 issues were framed. Of them issues Nos. 1, 5, 6, 11, 12 and 14 are material for our present purpose and they stand as follows:

(1) Has there been infringement of the rules relating to the time of commencement of poll by reason of the fact that polling at Booth No. 1 for Ajampur fixed at Ajampur to take place at 8 A.M. did not really commence until about half an hour later as alleged in Para 4 of the petition?

(5) Did the 1st respondent hire and procure a motor bus which was a service bus running between Tankere and Hiriyur belonging to one Ahmed Jan as alleged in Para 1 of the list of particulars and thereby commit the corrupt practice referred to in it?

(6) Did the 1st respondent take the assistance of a number of Government servants to further the prospects of his election as alleged in Para 2 of the list of particulars?

(11) Is the return of election expenses lodged by the 1st respondent false in material particulars and has the 1st respondent omitted to include in the return of election expenses, expenses incurred by him in connection with the election which would easily exceed the sanctioned limit of Rs. 5,000 as per particulars stated in Para 7 of the list of particulars?

(12) Has the election of the 1st respondent been procured and induced by the said corrupt practices with the result that the election has been materially affected?

(14) Would the petitioner have obtained a majority of votes had it not been for the aforesaid corrupt and illegal practices on the part of the first respondent?

The Tribunal by a majority of 2 to 1 found all these issues in favour of the petitioner and against the respondent No. 1 and on the strength of their findings on these issues, declared the election of respondent No. 1 to be void and the petitioner to have been duly elected. The judgment of the Tribunal is dated the 15th of January, 1953. On the 5th February, 1953, the respondent No. 1 presented an application before the Mysore High Court under Article 226 of the Constitution praying for a writ or direction in the nature of *certiorari* calling for the records of the proceeding of the Election Tribunal in Election Petition No. 1 of 1952-53 and quashing the same including the order pronounced by the Tribunal as mentioned above. This application was heard by a Division Bench consisting of Medappa, C.J., and Balakrishnaiah, J. and by their judgment dated the 11th January, 1954, the learned Judges allowed the petition of respondent No. 1 and directed the issue of a writ of *certiorari* as prayed for.—It is against this judgment that the appellant has come up to this Court on the strength of a certificate granted by the High Court under Articles 132 (1) and 133 (1) (c) of the Constitution.

The substantial contention raised by Mr Ayyangar, who appeared in support of the appeal, is, that the learned Judges of the High Court misdirected themselves both on facts and law, in granting *certiorari* in the present case to quash the determination of the Election Tribunal. It is urged, that the Tribunal in deciding the matter in the way it did did not act either without jurisdiction or in excess of its authority, nor was there any error apparent on the face of the proceedings which could justify the issuing of a writ to quash the same. It is argued by the learned counsel that, what the High Court has chosen to describe as errors of jurisdiction, are really not matters which affect the competency of the Tribunal to enter or adjudicate upon the matter in controversy between the parties and the reasons assigned by the learned Judges in support of their decision, proceed upon a misreading and misconception of the findings of fact which the Tribunal arrived at. Two points really arise for our consideration upon the contentions raised in this appeal. The first is, on what grounds could the High Court, in exercise of its powers under Article 226 of the Constitution, grant a writ of *certiorari* to quash the adjudication of the Election Tribunal? The second is, whether such grounds did actually exist in the present case and are the High Court's findings on that point proper findings which should not be disturbed in appeal?

The principles upon which the superior Courts in England interfere by issuing writs of *certiorari* are fairly well known and they have generally formed the basis of decisions in our Indian Courts. It is true that there is lack of uniformity even in the pronouncements of English Judges, with regard to the grounds upon which a writ or as it is now said, an order of *certiorari*, could issue, but such differences of opinion are unavoidable in judge-made law which has developed through a long course of years. As is well known, the issue of the prerogative writs, within which *certiorari* is included, had their origin in England in the King's prerogative power of superintendence over the due observance of law by his officials and Tribunals. The writ of *certiorari* is so named because in its original form it required that the King should be "certified of" the proceedings to be investigated and the object was to secure by the authority of a superior Court, that the jurisdiction of the inferior Tribunal should be properly exercised¹. These principles were transplanted to other parts of the King's dominions. In India, during the British days, the three chartered High Courts of Calcutta, Bombay and Madras were alone competent to issue writs and that too within specified limits and the power was not exercisable by the other High Courts at all. "In that situation" as this Court observed in *Election Commission, India v Saka Venkata Subba Rao*²

"the makers of the Constitution having decided to provide for certain basic safeguards for the people in the new set up which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and finding that the prerogative writs which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose they conferred in the States' sphere, new and wide powers on the High Courts of issuing direct orders or writs primarily for the enforcement of fundamental rights the power to issue such directions, 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England

¹ Vide *Ryots of Garabandho v Zemindar of Parlakumed* (1943) 2 M.L.J. 254 L.R. 70 (1953) 1 M.L.J. 702 (1953) S.C.J. 293 I.A. 129 at 140 (P.C.)

² (1953) 1 M.L.J. 702 (1953) S.C.J. 293

The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

One of the fundamental principles in regard to the issuing of a writ of *certiorari*, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin, L J, thus summed up the law on this point in *Rex v Electricity Commissioners*¹

"Whenever any body or person, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of King's Bench Division exercised in these writs.

The second essential feature of a writ of *certiorari* is that the control which is exercised through it over judicial or quasi judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of *certiorari* the superior Court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person².

The supervision of the superior Court exercised through writs of *certiorari* goes on two points, as has been expressed by Lord Sumner in *King v Nat Bell Liquors, Limited*³. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of *certiorari* could be demanded. In fact there is little difficulty in the enunciation of the principles, the difficulty really arises in applying the principles to the facts of a particular case.

Certiorari may and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances⁴. When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the

¹ L.R. (1924) 1 K.B. 171 at 205.

² *Vide Per Lord Cairns in Walsh v Limerick*
See v London and North-Western Railway Company,
(1878) L.R. 4 A.C. 30, 39.

³ L.R. (1922) 2 A.C. 128 156.

⁴ *Vide Halsbury*, 2nd edition, Vol IX,
page 880.

Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess¹

A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of *certiorari* may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by *certiorari* but not a mere wrong decision. The essential features of the remedy by way of *certiorari* have been stated with remarkable brevity and clearness by Morris, L.J., in the recent case of *Rex v Northumberland Compensation Appellate Tribunal*². The Lord Justice says

It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown.³

In dealing with the powers of the High Court under Article 226 of the Constitution this Court has expressed itself in almost similar terms⁴ and said

Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of the record and such act, omission or error or excess has resulted in manifest injustice. However extensive the jurisdiction may be it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of *certiorari* under Article 226 of the Constitution.

We will now proceed to examine the judgment of the High Court and see whether the learned Judges were right in holding that sufficient and proper grounds existed for the issue of *certiorari* in the present case.

The grounds upon which the High Court has granted the writ have been placed in the judgment itself under three heads. The first head points out in what matters the Election Tribunal acted without jurisdiction. It is said, in this connection, that the Tribunal had no jurisdiction to extend the period of limitation for the presentation of the election petition and it had no authority also to allow the petitioner's prayer for amendment and to hear and dispose of the case on the basis of the amended petition. The second head relates to acts in excess of jurisdiction. The Tribunal, it is said, acted in excess of jurisdiction in so far as it went into and decided questions not definitely pleaded and put in issue, and not only did it set aside the election of respondent No. 1 but declared the petitioner to have been duly elected, although there was no definite finding and no proper materials for arriving at a finding, that the petitioner could secure more votes than respondent No. 1 but for the corrupt practices of the latter.

¹ Vide *Banbury v Fuller*, (1854) L.R. 9 Exch 111, *R v Income Tax Special purposes Com missioners* (1833) L.R. 21 Q.B.D. 313.

² L.R. (1952) 1 K.B. 338 at 357.

³ Vide *Veerappa Pillai v Raman & Raman, Ltd.*, (1952) 1 M.L.J. 806 (1952) S.C.J. 261; (1952) 5 C.R. 583 at 594 (S.C.).

The third head purports to deal with errors apparent on the face of the record. These apparent errors, according to the High Court, vitiated three of the material findings upon which the Tribunal based its decision. These findings relate to the commencement of polling at one of the polling booths much later than the scheduled time, the respondent No. 1's obtaining the services of a Government servant to further his prospects of election and also to his lodging a false return of expenses. We will take up these points for consideration one after another.

As regards absence of jurisdiction the High Court is of opinion that the Tribunal acted without jurisdiction, first in extending the period of limitation in presentation of the election petition and secondly in allowing the petitioner's prayer for amendment and dealing with the case on the basis of the amended petition. The view taken by the High Court seems to be that under the Representation of the People Act (hereinafter called "The Act"), no power is given to the Election Tribunal to condone the delay, if an election petition is presented after the period prescribed by the rules, nor is it competent to allow an amendment of the petition after it is presented, except in the matter of supplying further and better particulars of the illegal and corrupt practices set out in the list annexed to the petition, as contemplated by section 83 (3) of the Act.

Assuming, though not admitting, that the propositions of law enunciated by the learned Judges are correct, we do not think that they at all arise for consideration on the actual facts of the present case. As regards the first matter, the election petition, as stated above, was despatched by the petitioner by registered post to the Election Commission on the 11th of April, 1952 and it reached the Commission on the 14th of April, following. We may take it therefore that 14th of April was the date when the election petition could be deemed to have been presented to the Election Commission under section 81 (2) (b) of the Act. Under rule 119 of the Election Rules framed under the Act, an election petition against a returned candidate is to be presented at any time after the publication of the name of such candidate under section 67 of the Act, but not later than 14 days from the date of publication of the notice in the official gazette under the rule 113, that the return of election expenses of such candidate and the declaration made in respect thereof have been lodged with the Returning Officer. It is not disputed that this notice of the return of election expenses was published in the Mysore Gazette on the 31st of March, 1952 and the petition therefore was just in time as it was presented within and not later than 14 days from that date. The High Court seems to think that in computing the period of 14 days the date of publication is to be included. This seems to us to be an unwarrantable view to take which is opposed to the ordinary canons of construction. Dr Tek Chand appearing for the respondent No. 1 plainly confessed his inability to support this view and we must hold therefore that there is no question of the Tribunal's entertaining the election petition after the prescribed period in the present case.

Coming now to the question of amendment, the High Court, after an elaborate discussion of the various provisions of the Act, came to the conclusion that the Election Tribunal which is a special Court endowed with special jurisdiction has no general power of allowing amendment of the pleadings, and that the express provision of section 83 (3) of the Act, which empowers the Tribunal to allow amendments with respect to certain specified matters, impliedly excludes the power of

allowing general amendment as is contemplated by Order 6, rule 17 of the Civil Procedure Code. Here again the discussion embarked upon by the High Court seems to us to be unnecessary and uncalled for. The only amendment applied for by the petitioner was a modification in the prayer clause by insertion of an alternative prayer to the original prayer in the petition. No change whatsoever was sought to be introduced in the actual averments in the petition and the original prayer which was kept intact was repeated in the application for amendment. The alternative prayer introduced by the amendment was not eventually allowed by the Tribunal which granted the prayer of the petitioner as it originally stood. In these circumstances the mere fact that the Tribunal granted the petitioner's application for amendment becomes altogether immaterial and has absolutely no bearing on the actual decision in the case. We are unable to hold therefore that the Tribunal acted without jurisdiction in respect to either of these two matters.

The High Court has held that the Tribunal acted in excess of its jurisdiction in entering into certain questions which are not covered by the pleadings of the parties and not specifically put in issue. The other act in excess of its authority committed by the Tribunal according to the High Court, is, that it declared the petitioner to be a duly elected candidate on a mere speculation although it did not find and had no materials to find that the petitioner could secure more votes than the respondent No. 1. On the first point the learned Judges have referred only to the allegation of corrupt practice made by the appellant, regarding the hiring and procuring by the respondent No. 1, of a motor bus belonging to Ahmed Jan for transporting his voters to the polling booths. The issue framed on this point is issue No. 5 which is worded as follows:

Did the first respondent hire and procure a motor bus which was a service bus running between Tanikere and Hariyur belonging to one Ahmed Jan, as alleged in paragraph 1 of the list of particulars and thereby commit the corrupt practice referred to in it?

The Tribunal found that the hiring of the bus by respondent No. 1 was not proved, but it was proved that the first respondent did procure the service bus of Ahmed Jan, who was acting as his agent, for conveying his voters. The Tribunal further found that even if Ahmed Jan was not an agent of the first respondent, as he was actually carrying the voters of the latter from Gowrapur to Sollapur in a bus, which bore the first respondent's election symbol, with his knowledge and connivance, the first respondent must be held guilty of the corrupt practice in question. The High Court says that as it was nowhere alleged in the petition that Ahmed Jan was an agent of respondent No. 1 or that he was carrying the voters with his connivance, the Tribunal must be held to have acted in excess of its jurisdiction in going into matters which were not definitely pleaded. We do not think that this view of the High Court can be supported. In paragraph 8 of the petition the appellant definitely stated that the first respondent by himself and through his agent committed major corrupt practices, one of which was the hiring or procuring of Ahmed Jan's motor bus. The Tribunal found, on a consideration of the evidence adduced in the case, that the motor bus was procured by the first respondent and his conduct in this respect as disclosed by the evidence, showed that his voters were being carried by Ahmed Jan with his knowledge and connivance. It may be pointed out that in paragraph 9 of the petition the petitioner clearly stated that the corrupt practices were committed by respondent No. 1, or his agents, or by several persons with his knowledge and connivance. The finding of the Tribunal arrived at on this point is a finding of fact based on evidence.

adduced by the parties and it is not in any way outside the pleadings or inconsistent therewith.

The other ground put forward by the High Court that the Tribunal exceeded its jurisdiction in declaring the appellant to be the duly elected candidate, although it had no materials to come to the conclusion that he could have secured more votes than respondent No. 1 but for the corrupt practices committed by the latter, seems to us to be without substance. It appears that the learned Judges did not properly advert to the findings arrived at on this point by the Election Tribunal. The petitioner, it may be noted, got only 34 votes less than the respondent No. 1. The Tribunal has found that the bus of Ahmed Jan which was procured by respondent No. 1, did carry to the polling booths about 60 voters in two trips and in the circumstances of the case it could be legitimately presumed that the majority of them did vote for respondent No. 1. If the votes of at least 40 or 50 of these persons be left out of account as being procured by corrupt practice of the first respondent, the latter's majority by 34 votes would be completely wiped out and the petitioner would gain an undisputed majority. In paragraph 33 of its judgment the Tribunal states as follows:

Hence on the 14th issue we hold that the petitioner would have obtained a majority of votes had it not been for the aforesaid corrupt practices on the part of the first respondent.

Thus the finding is there and there is evidence in support of it. Whether it is right or wrong is another matter and it may be that the view taken by the dissenting member of the Tribunal was the more proper but it cannot be said that the Tribunal exceeded its jurisdiction in dealing with this matter.

We now come to what the High Court has described as errors apparent on the face of the record. These errors according to the High Court, appear in respect of three of the findings arrived at by the Tribunal. The first of these findings relates to the time when the polling at Booth No. 1 at Ajampur commenced on the date of election. The Tribunal has held that the time fixed by notification was 8 A.M. in the morning but the polling did not commence till 25 minutes after that and the result was that a number of voters went away. It is said that some of these voters would in all probability have voted for the appellant and as there was a difference of only 34 votes between him and the respondent No. 1 the results of the election have been materially affected by this irregularity or violation of the election rules. There was evidence undoubtedly to show that some of the voters went away as the polling did not commence at the scheduled time but the exact number of these persons is not known and there could not be any positive evidence to show as to how many of them would have voted for the appellant. If the Tribunal had on the basis of these facts alone declared the appellant to be the duly elected candidate holding that he could have secured more votes than respondent No. 1 obviously this would have been an error apparent on the face of the record as such conclusion would rest merely on a surmise and nothing else. The Tribunal, however discussed this matter only in connection with the question as to whether the violation of any statutory rule or order in the holding of election did materially affect the result of the election which would entitle the Tribunal to declare the election of the returned candidate to be void under section 100 (2) (c) of the Act. Thus the Tribunal was competent to do under the provisions of the Act and in doing so it could take into consideration the circumstances and probabilities of the case. But as we have stated already, the Tribunal declared the appellant to be duly elected upon the specific finding that, but for the corrupt practice of

respondent No 1 in the matter of procuring the service bus of Ahmed Jan, the appellant would have got majority of the votes. We cannot say that this is an error apparent on the face of the record which would entitle the High Court to interfere by writ of *certiorari*.

As regards the other two findings, one relates to the receiving of assistance from Paramesswarappa who is a Patel, by respondent No 1 in furtherance of his prospects of election. The High Court does not dispute the facts alleged by the appellant that Paramesswarappa accompanied the first respondent and actually canvassed at several places and that he openly canvassed at one polling booth on the polling day. The learned Judges say that even if these facts are believed, they only establish that Paramesswarappa canvassed for the petitioner but that would not amount to respondent No 1's taking assistance from him. This does not seem to us to be a proper view to take. There was allegation by the appellant of the respondent No 1's taking assistance from a Government servant within the meaning of section 123 (8) of the Act. In proof of the allegation evidence was given of the facts mentioned above. If from these facts which were found to be true the Tribunal drew the conclusion that there had been an assistance taken from a Government servant which would come within the purview of section 123 (8) of the Act, it is impossible to say that this is an error apparent on the face of the record.

The remaining finding relates to the allegation of the petitioner that the respondent No 1 in his return of election expenses omitted to include several items and if they had been taken into account the election expenses would have exceeded the sanctioned limit. The Tribunal has held that the respondent No 1 omitted to include, in his return of expenses, the petrol charges, the hiring charges in respect of some cars and vans hired by him and also the dinner expenses incurred in the hotels. The High Court has observed that as regards the first item the finding of the Tribunal is based on no evidence and rests on mere speculation. We do not think that we can accept this view as correct. The first respondent stated that he had used two cars which were his own and incurred petrol expenses to the extent of Rs 1,083 3 0. The Tribunal has found in paragraph 29 of its order on the basis of both documentary and oral evidence that the respondent No 1 had used six other cars and had purchased petrol for them for the purpose of his election campaign. The Tribunal held that the first respondent must have spent not less than the sum of Rs 1 250 on this account which was not included in the list of expenses. We are unable to say that this finding rests on no evidence.

As regards the omission to include hiring charges the High Court has observed that the Tribunal did not record any finding that such hiring was proved. The Tribunal has in fact found that as regards some cars they were hired, while others had been taken on loan the money value for their use having been paid by the first respondent which is tantamount to saying that he had to pay the hiring charges. The matter has been dealt with in paragraph 29 (d) of the Tribunal's order and the entire evidence has been gone through. We are unable to say that the finding of the Tribunal that the respondent No 1 had omitted to include in his return of election expenses the dinner and hotel charges is a finding unsupported by any evidence. Reference may be made in this connection to paragraph 29 (f) of the Tribunal's order which deals with the matter in details. On the whole our opinion is that the so-called apparent errors pointed out by the High Court are neither errors of law nor do they appear on the face of the record. An appellate Court might

have on a review of this evidence come to a different conclusion but these are not matters which would justify the issue of a writ of *certiorari*. In our opinion the judgment of the High Court cannot be supported and this appeal must be allowed. The writ issued by the High Court will therefore be vacated. We make no order as to costs of this appeal.

Appeal allowed

SUPREME COURT OF INDIA

[Original Jurisdiction]

PRESENT —MEHR CHAND MAHAJAN *Chief Justice*, B K MUKHERJEA, VIVIAN BOSE, N H BHAGWATI AND T L VENKATARAMA AYYAR, JJ

Virendra Singh and others

*Petitioners **

v

The State of Uttar Pradesh

Respondent

The Union of India

.. *Intervener*

Constitution of India (1950) Articles 19 (f) and 31 (1)—Applicability—Grants by Rulers of States before acceding to the Dominion of India—If can be set aside by the Union or State Government by act of State after the coming into force of the Constitution of India 1950

On 5th January 1948, the Ruler of the then Independent State of Sarila granted a village to the petitioners and on 26th January, 1948 the Ruler of Charkhari granted, certain villages also to the petitioners. Immediately after India attained Independence the two States along with others acceded to the new Dominion. On 13th March 1948 thirty five states including Sarila and Charkhari agreed to unite themselves into one State which was to be called the United States of Vindhya Pradesh.

The integration did not work satisfactorily. On 26th December 1949 the same thirty five Rulers entered into another agreement abrogating their covenant and dissolving the newly created State as from 1st January, 1950. By the same instrument each Ruler ceded to the Government of the Indian Dominion as from the same date full and exclusive authority jurisdiction and powers fir, and in relation to the Governance of the State. The Dominion of India took over the administration of the States which formed Vindhya Pradesh on 1st January 1950 and decided to form them into a Chief Commissioner's Province and brought the new Province into being on 23rd January, 1950. The villages which were granted to the petitioners which were enclaves were taken out of this Province and absorbed into the United Provinces (now Uttar Pradesh). On 29th August, 1952 the Uttar Pradesh Government in consultation with the Government of India revoked the grants made by the Rulers to the petitioners. The petitioners then filed a petition under Article 32 of the Constitution against the State of Uttar Pradesh.

Held, under the Constitution no State Government has the right to do anything in the nature of an 'act of State'. Even assuming that in view of the fact that the revocation was made after consultation with the Government of India that the act of the Uttar Pradesh Governor as a delegate of the sovereign authority has been approved and ratified by that authority even the Government of India did not have that power. The petitioners had an indefeasible right to possession of the villages granted to them which they could have enforced upto 26th January 1950 in the Dominion Courts against all persons except possibly the Rulers who granted the land and except possibly the State. After that date the Constitution came into force. The Constitution by reason of authority derived from and conferred by the peoples of this land blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State sought to uphold in the instant case.

We are no longer concerned with principalities and powers. We have upon us the whole armour of the Constitution and walk from henceforth in its enlightened ways wearing the breast plate of its protecting provisions and flashing the flaming sword of its inspiration.

Whether the State would have the right to set aside the grants in the ordinary Courts of the land or whether it can deprive the petitioners of these properties by legislative process are questions

on which no opinion need be expressed. The present action of the State revoking the grants cannot be defended as Article 31 (1) and Article 19 (f) are attracted.

Petition under Article 32 of the Constitution of India, praying that the Order of the Governor of Uttar Pradesh, dated the 29th August, 1952, revoking the grants made by the Rulers of Charkhari and Sarila in favour of the Petitioners be declared void.

K S Krishnaswami Ayyangar and S P Sinha, Senior Advocates (*Bishan Singh and S S Shukla*, Advocates, with them) for the Petitioners

Gopalji Mehrotra and C P Lal, Advocates for Respondent

C K Daphtary, Solicitor-General for India (*G N Joshi, Porus A Mehta and P G Gokhale*, Advocates, with him) for Intervener

The Order of the Court was pronounced by

Base, J—This is a petition under Article 32 of the Constitution. It raises an important question about the post Constitutional rights to property situate in Indian States that were not part of British India before the Constitution but which acceded to the Dominion of India shortly before the Constitution and became an integral part of the Indian Republic after it.

The States in question here are Charkhari and Sarila. In British days they were independent States under the paramountcy of the British Crown. They acknowledged the British Crown as the suzerain power and owed a modified allegiance to it, but none to the Government of India.

In 1947 India obtained Independence and became a Dominion by reason of the Indian Independence Act of 1947. The suzerainty of the British Crown over the Indian States lapsed at the same time because of section 7 of that Act. Immediately after, all but three of the Indian States acceded to the new Dominion by executing Instruments of Accession. Among them were the two States with which we are concerned. The new Dominion of India was empowered to accept these accessions by a suitable amendment in the Government of India Act, 1935. The sovereignty of the acceding State was expressly recognised and safeguarded. The operative words of the Instrument of Accession which each Ruler signed were—

Now Therefore I, _____ Ruler of _____ in the exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession."

and clause 8 provided that—

Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State."

Broadly speaking, the effect of the accession was to retain to the Rulers their full autonomy and sovereignty except on three subjects: Defence, External Affairs and Communications. These were transferred to the Central Government of the new Dominion.

One other clause is important, clause 6, which provided that—

"Nothing in this Instrument shall empower the Dominion Legislature to make any law for the State authorising the compulsory acquisition of land for any purpose."

About the same time, each acceding Ruler entered into a standstill agreement with the Dominion of India. The following clause is relevant

"Nothing in this agreement includes the exercise of any paramountcy functions."

The alienations now in question were made in January, 1948. On 5th January, 1948, the Ruler of Sarila granted the village Rigwara to the petitioners and on 28th January, 1948, the Ruler of Charkhari granted the villages Patha, Kua and Aichana, also to the petitioners.

After this, on 13th March, 1948, thirty five States in Bundelkhand and Baghelkhand (including Charkhari and Sarila) agreed to unite themselves into one State which was to be called the United State of Vindhya Pradesh. In pursuance of this agreement each of the thirty five Rulers signed a covenant on 18th March, 1948, which brought the new State into being. It is important to note that this was a purely domestic arrangement between themselves and not a treaty with the Dominion of India. Each Ruler necessarily surrendered a fraction of his sovereignty to the whole but there was no further surrender of sovereign powers to the Dominion of India beyond those already surrendered in 1947 namely Defence, External Affairs and Communications. Despite the readjustment, the sum total of the sovereignties which has resided in each before the covenant now resided in the whole and its component parts—none of it was lost to the Dominion of India.

Soon after this the Revenue Officers of the newly formed Vindhya Pradesh Union tried to interfere with the grants made by certain Rulers of the integrating States before the integration, among them were the grants in question here. This occasioned complaints to the Vindhya Pradesh Government and that Government decided on 7th December, 1948 to respect the impugned grants. The Revenue Minister's order of that date runs—

After considering over the whole question it has been decided that such grants made by the Rulers before signing the covenant should be respected, because constitutionally the V P Government should not refuse recognition to such grants unless they are directed otherwise by the State Ministry.

Orders were accordingly issued to the Revenue Officers concerned to "abstain from interfering in such grants." This decision was communicated to the Rulers of Charkhari and Sarila on 13th March, 1949. They were told that their grants would be respected.

The integration did not work satisfactorily, so, on 26th December, 1949, the same thirty five Rulers entered into another agreement abrogating their covenant and dissolving the newly created States as from 1st January, 1950. By the same instrument each Ruler ceded to the Government of the Indian Dominion as from the same date "full and exclusive authority, jurisdiction and powers for, and in relation to, the governance of that State." Article II provided that—

As from the aforesaid day the United State of Vindhya Pradesh shall cease to exist and all the property, assets and liabilities of that State, as well as its rights, duties and obligations shall be those of the Government of India.

This Instrument was called the Vindhya Pradesh Merger Agreement. The Government of the Indian Dominion was also a party and its Secretary in the Ministry of States appended his signature to the document. Each Ruler was guaranteed a privy purse and all the personal privileges, dignities and titles enjoyed by him at the date of the Agreement. Immediately after the clause guaranteeing the privy purse comes the following—

Article IV

(2) The said amount is intended to cover all the expenses of the Ruler and his family and shall neither be increased nor reduced for any reason whatsoever.

The following clauses are also relevant :

Article VI

"The Government of India guarantees the succession, according to law and custom, to the gaddi of each Covenanting State, and to the personal rights, privileges, dignities and titles of the Ruler thereof

Article VII

(1) The Ruler of each Covenanting State shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the administration of that State to the Raj Pramukh in pursuance of the Covenant

(2) If any dispute arises as to whether any item of property is the private property of the Ruler or State property, it shall be referred to a judicial officer to be nominated by the Government of India, and the decision of that officer shall be final and binding on all parties concerned

Article VIII

No enquiry shall be made by or under the authority of the Government of India, and no proceeding shall lie in any Court, against the Ruler of any Covenanting State, whether in a personal capacity or otherwise in respect of anything done or omitted to be done by him or under his authority during the period of his administration of that State "

The Dominion Government took over the administration of the States which formed Vindhya Pradesh on 1st January, 1950 and decided to form them into a Chief Commissioner's Province. It did this by a Notification of the Governor-General, dated 22nd January, 1950 and brought the new Province into being on 23rd January, 1950. But the four villages we are concerned with (called enclaves) were taken out of this Province on 25th January, 1950 and absorbed into the United Provinces (now Uttar Pradesh) by an Order of the Governor-General entitled the Provinces and States (Absorption of Enclaves) Order, 1950. This Order was made under sections 290, 290-A and 290-B of the Government of India Act, 1935.

The portions of that Order relevant for the present purpose are these :

" 3 (1) As from the appointed day, every enclave specified in the First Schedule shall cease to form part of the surrendering unit, and shall be included in, and form part of, the absorbing unit
..... "

" 6 All property and assets within an enclave which, immediately before the appointed day, vested in the Government of the surrendering unit shall, as from that day, vest in the Government of the absorbing unit

7 All rights, liabilities and obligations whether arising out of contract or otherwise, of the Government of a surrendering unit in relation to an enclave shall, as from the appointed day, be the rights, liabilities and obligations, respectively, of the Government of the absorbing unit

8 All laws in force in an enclave immediately before the appointed day shall, as from that day cease to be in force in that enclave, and all laws in force in the absorbing unit shall, as from that day extend to, and be in force in that enclave "

The Constitution came into force on 26th January, 1950. Later that year the Uttar Pradesh Government decided to reopen the question of revocation which the Vindhya Pradesh Government had settled on 7th December, 1948, and on 29th August, 1952, more than two and a half years after the Constitution and four and a half years after the grants, the Uttar Pradesh Government, in consultation with the Government of India, revoked the grants with which we are concerned. The Governor of Uttar Pradesh issued the following order on 29th August, 1952 :

" Subject Voidable grants of Jagus and Muafis made by the Rulers of Charkhari and Sarila before the integration

With reference to your endorsement No 383, N 110-1950 dated 30th September 1950, on the above subject I am directed to say that in consultation with the Government of India, the Governor has decided to revoke the grants made by the rulers of Charkhari and Sarila on or after 1st January, 1948, to the members of their families relations and others

Copies of this order were forwarded to the Rulers of Charkhari and Sarila on 29th January, 1953

This occasioned the present petition under Article 32 of the Constitution against the State of Uttar Pradesh. The Union Government was allowed to intervene. The State of Uttar Pradesh made the following affidavit in reply

(3) That immediately before or after the signing of the agreement some Rulers of the Indian States constituting the Vindhya Pradesh Union whose territories were subsequently absorbed in the Uttar Pradesh, had granted jagirs and muafis of land to their near relations *mala fide* and thereby indirectly increased their privy purse

(4) That it appears that Vindhya Pradesh Government opened the case of *mala fide* grants made by the rulers of integrating states and at their instance the Government of India issued instructions to the Uttar Pradesh Government to do the same

(9) The effect of these grants is to increase the privy purse of the ruler whose responsibility it was to support the grantees

The operative order of revocation was made by the Governor of Uttar Pradesh, and under the Constitution it is clear that no State Government has the right to do anything in the nature of an act of State, but in view of the fact that the revocation was made in consultation with the Government of India, we were asked to treat the Uttar Pradesh Governor as a delegate of the sovereign authority whose act has been approved and ratified by that authority, along the lines of *Buron v Denman*¹, *The Secretary of State in Council of India v Kamachee Boye Sahaba*² and *Johnstone v Pedlar*³, and to decide on that basis whether the Union Government had the right and power to revoke these grants as an act of State

Jurists hold divergent views on this matter. At one extreme is the view of the Privy Council in a series of cases. Their effect was summarised in *Vajesingji Joravarsingji v Secretary of State for India in Council*⁴ and again in *Secretary of State v Sardar Rustam Khan*⁵ in the following words

A summary of the matter is this. When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest it may be by cession following on treaty it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has brought his officers to recognise. Such rights as he had under the rule of predecessors avail him nothing. Nay more even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties

also in the *Secretary of State in Council of India v Kamachee Boye Sahaba*² and in *Johnstone v Pedlar*³ as follows

"Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious taken as a whole to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient

1 (1848) L.R. 2 Exch. Rep. 167

2 (1859) 7 M.I.A. 476 at 540

3 L.R. (1921) 2 A.C. 262 at 279

4 (1924) 47 M.L.J. 574 L.R. 51 I.A. 357 at

360 I.L.R. 48 Bom. 613 (P.C.).

5 (1941) L.R. 68 I.A. 109 at 125 I.L.R.

(1941) Kar. (P.C.) 94 (P.C.)

6 L.R. (1921) 2 A.C. 262 at 280

to say that, even if a wrong has been done it is a wrong for which no Municipal Court of justice can afford a remedy

According to the Privy Council in *Secretary of State for India in Council v Bai Rajbar*¹ and also in *Vajesingji Jorawarsingji v Secretary of State for India in Council*², the burden of proving that the new sovereign has recognised the old rights lies on the party asserting it. The learned Solicitor General relies on these cases.

At the other extreme is the view of Chief Justice John Marshall of the United States Supreme Court. He said in the *United States v Percheman*³ in the year 1833 :

' It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of rights which is acknowledged and felt by the whole civilised world would be outraged; if private property should be generally confiscated and private rights annulled. The people change their allegiance, the relation to their ancient sovereign is dissolved but their relations to each other, and their right of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another conveying the compound idea of surrendering at the same time the lands and the people who inhabit them would be necessarily understood to pass the sovereignty only and not to interfere with private property.

This view was followed by Cardozo, J. in 1937 in *Shapleigh v Mier*⁴. He said—

' Sovereignty was thus transferred but private ownership remained the same. To find the title to the land today we must know where title stood while the land was yet in Mexico '.

We gather from Hyde's *International Law*, Volume I, second edition, page 433, that the same principle was laid down by the Permanent Court of International Justice. The learned author quotes the Court as saying in its *Sixth Advisory Opinion of 10th September, 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*—

" Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice. It suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty '.

The learned counsel for the petitioners relies on this class of case and derives thus much support for it from the Privy Council in *Mayor of Lyons v East India Company*⁵ where Lord Brougham said—

' It is agreed on all hands that (when) a foreign settlement (is) obtained in an inhabited country by conquest or by cession the law of the country continues until the Crown or the Legislature change it.

It is right however to point out that Hyde places limitations of the doctrine at page 432 and that the learned authors of *Corpus Juris International Law*,

¹ (1915) 29 M.L.J. 242 L.R. 42 I.A.
229 at 239 (P.C.)

² (1924) 47 M.L.J. 574 L.R. 51 I.A. 357
at 361. 1 L.R. 48 Bom. 613 (P.C.)

³ (1833) 32 U.S. 51 at 86, 87

⁴ (1937) 299 U.S. 468 at 470

⁵ (1836) 1 M.L.A. 175 at 270, 271.

Volume 33, page 415, place the limitation that in the absence of express understanding a conqueror assumes no obligations of the conquered State. This distinction was also drawn by Lord Alverstone, C.J. in *West Rand Central Gold Mining Company v Rex*¹ where, commenting on the American cases, he said that there is a difference between the private rights of individuals in private property and contractual rights which are sought to be enforced against the new sovereign. He said—

"It must not be forgotten that the obligations of conquering States with regard to private property of private individuals particularly land as to which the title had already been perfected before the conquest or annexation are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged or a lien has been created upon it considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State."

Lord Alverstone also pointed out that in the American cases, on which the international jurists have based their views the treaties of cession as well as the subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession and so the only question for decision in each of those cases was whether any private rights of property actually existed at the relevant date. Now that is also the English law for the Privy Council and the House of Lords have also held that the new sovereign can choose to waive his rights and recognise titles and rights as they existed at the date of cession. This recognition can be given either by legislation or by proclamation and it can even be inferred from the mode of dealing with the property after the cession. *Forester v Secretary of State for India in Council*² (legislation), *Secretary of State v Bai Rajbai*³ (agreement, legislation and mode of dealing), *Mayor of Lyons v East India Company*⁴ (waiver) and at page 285 (relinquishment), also *Vajesingji Joraarsinghi v Secretary of State for India*⁵ and *Secretary of State v Sardar Rustam Khan*⁶.

In dealing with the views of international jurists Lord Halsbury insisted that they were only enunciations of what in their opinion the law ought to be and had no binding force. He said in the House of Lords in *Cook v Spragg*⁷

"It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well understood rules of international law a change of sovereignty by cession ought not to affect private property but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

His view was endorsed by the Privy Council in *Secretary of State v Sardar Rustam Khan*⁸ and again in the House of Lords in *Johnstone v Pedlar*⁹. Lord Alverstone, C.J. analysed in detail how far international law can be accepted and applied in municipal Courts of justice in *West Rand Central Gold Mining Company v Rex*¹⁰ and set out reasons for the above conclusion.

1 L.R. (1903) 2 K.B. 391 at 411

2 L.R. (1872-73) 1 A. Suppl. 10 at 17

3 (1915) 29 M.L.J. 242 L.R. 42 IA

229 at 237 (P.C.)

4 1 M.L.A. 175 at 281

5 (1924) 47 M.L.J. 574 L.R. 51 IA 357

at 361 I.L.R. 48 B.N. 613 (P.C.)

6 (1911) L.R. 68 IA 109 at 123 I.L.R. (1911) Kar. (P.C.) 94 (P.C.)

7 L.R. (1899) A.C. 572 at 578

8 L.R. (1911) 2 A.C. 262 at 281

9 L.R. (1905) 2 K.B. 391 at 401 408

The learned counsel for the petitioners also relies on another limitation which the English Courts have placed on an act of State. He says that even if the right to confiscate be conceded it must be taken to have been waived if either the Crown or its officers purport to act under colour of a legal title and not arbitrarily. He contended that arbitrariness was of the essence in an act of State. He relied on *Secretary of State in Council of India v Kamachee Boye Sahaba*¹, *Forester v Secretary of State for India in Council* and *Johnstone v Pedlar*². He pointed out that the affidavit of the respondent shows that Government decided to confirm all grants except those which were *mala fide*. Therefore this was no arbitrary act of annexation but an attempt to exercise what was thought to be a legal right.

We do not intend to discuss any of this because in our opinion none of these decisions has any bearing on the problem which confronts us namely the impact of the Constitution on the peoples and territories which joined the Indian Union and brought the Constitution into being. The flow of events up to the date of final accession 1st January 1950 are only of historical interest in the present matter. The Rulers of Charkhari and Sarila retained at the moment of final accession whatever measure of sovereignty they had when paramountcy lapsed, less the portion given to the Indian Dominion by their Instruments of Accession in 1947. They lost none of it during the interlude when they toyed with the experiment of integration. There was then redistribution of some of its aspects but the whole of whatever they possessed before the integration returned to each when the United State of Vindhya Pradesh was brought to an end and ceased to exist. Thereafter each acceded to the Dominion of India in his own right.

Now it is undoubted that the accessions and the acceptance of them by the Dominion of India were acts of State into whose competency no municipal Court could enquire nor can any Court in India after the Constitution, accept jurisdiction to settle any dispute arising out of them because of Article 363 and the proviso to Article 131. All they can do is to register the fact of accession see section 6 of the Government of India Act 1935 relating to the Accession of States. But what then? Whether the Privy Council view is correct or that put forward by Chief Justice Marshall in its broadest outlines is more proper all authorities are agreed that it is within the competence of the new sovereign to accord recognition to existing rights in the conquered or ceded territories and by legislation or otherwise to apply its own laws to them and these laws can and indeed when the occasion arises must be examined and interpreted by the municipal Courts of the absorbing State.

Now in the present case what happened after the final accession? There was already in existence in 1949 section 290-A of the Government of India Act 1935 which provided as follows:

- It is a notification of certain Accessions, States as a Chief Commissioner's Province.
- Ad. Where full and exclusive authority jurisdiction and powers for and in relation to the
- (1) of any Indian State or of any group of such States are for the time being exercisable by the Government of India the Governor-General may by Order direct
- the Dominion of the State or the group of States shall be administered in all respects as if the State or
- (a) that the States were a Chief Commissioner's Province
- the group of States

¹ A 476 at 531

² I.A. Suppl. 10 at 17

3 L.R. (1921) 2 A.C. 262 at 281

¹ (1877) 7 M.L.R. 1

² L.R. (1872) 7 M.L.R. 1

(2) Upon the issue of an Order under clause (a) of sub-section (1) of this section all the provisions of this Act applicable to the Chief Commissioner's Province of Delhi shall apply to the State or the group of States in respect of which the Order is made.

The final Instrument of Accession complies with sub-section (1) above. The necessary Order was made and the Chief Commissioner's Province of Vindhya Pradesh, which at that date included the property in dispute, came into being on 23rd January, 1950. Now it is beyond dispute that there neither can, nor could, be confiscation of property as an act of State in the Chief Commissioner's Province of Delhi. It is difficult to see how there could be in an area which was being administered by the Dominion Government in all respects as a Chief Commissioner's Province even if the person in possession was not, at the time, a national of the country an assumption which is by no means indisputable, indeed that is the effect of the decision of the Privy Council in *Mayor of Lyons v East India Company*¹. There would appear to have been a clear election by the sovereign authority expressed in its own legislation to waive its rights of confiscation even if they were there (a point we do not decide), and the same consequences followed when the properties in dispute were incorporated into the State of Uttar Pradesh, two days later, on 25th January, 1950. The Privy Council goes even further in *Mayor of Lyons v East India Company*¹ at page 285 and say that the waiver or relinquishment can be established from the treaty itself.

It cannot be denied that the Crown may relinquish its prerogative indeed whenever the inhabitants of conquered provinces are held to obtain the rights of subjects by treaty (and even Sir F. Norton has no doubt of this being possible) those who hold the doctrine the most vigorously must say that the treaty is a voluntary abandonment of a right of the Crown. It evidences the will of the sovereign to exempt the conquered territory from this branch of his prerogative. But the same will of the sovereign may be collected from other circumstances and the like abandonment of the prerogative be thus evidenced.

But however that may be, the fact remains that the titles of these petitioners to the disputed lands had not been repudiated up to the 26th of January 1950. It is immaterial whether or not the right of the Dominion Government to do so remained in abeyance till exercised despite the agreement embodied in the Instruments of Accession and the legislation and notification quoted above because, in fact, it was not exercised.

Now what was the effect of the non exercise of those rights? Even on the English view, the person in *de facto* possession is not without rights in the land, nor is he altogether without remedy. It is just a question of the means of redress. In *Johnstone v Pedlar*², Lord Atkinson, speaking in the House of Lords, said—

It is on the authorities quite clear that the injury inflicted upon an individual by the act of State of a sovereign authority does not by reason of the nature of the act by which the injury is inflicted cease to be a wrong. What these authorities do establish is that a remedy for the wrong cannot be sought for in the Courts of the sovereign authority which inflicts the injury and that the aggrieved party must depend for redress upon the diplomatic action of the State of which he is a subject.

So also in *Forester v Secretary of State for India*³, the Begum, whose estate Government sought to confiscate as an act of State, was only in *de facto* possession—see page 16. The Privy Council held that the Government had purported to act under colour of a legal title, so its attempt at resumption was not an act of State and consequently could be reviewed in the Courts. Their Lordships thereupon proceeded to investigate the Begum's title not under the British Government,

¹ (1836) 1 M.L.A. 175 at 274, 275

³ L.R. (1872-73) 1 A. Suppl. 10

² L.R. (1921) 2 A.C. 262 at 278

but as derived from the sovereign power which preceded it (page 18). So also in *Major of Lyons v East India Company*¹, the title of a foreign alien to land was upheld, not under the English law (because if that had applied there would have been an escheat), but under the law in India derived from non British sources, that is to say, under the laws of the land before cession. It was held that those laws continued until changed and for that reason a title which would have been bad under the English law was upheld. At page 274 their Lordships say—

It follows from what has been observed, not only that Calcutta was a district acquired in a country peopled and having a Government of its own but that, for a long course of time no such law as that which incapacitates aliens could be introduced any more than it could now be introduced into such part of the Asiatic or Portuguese territory . . .

and at page 271 they had already said—

In the former case it is allowed that the law of the country continues until the Crown, or the Legislature change it.

Lord Atkinson's view in *Johnstone v Pedlar*² at page 281 appears to point to the same conclusion. He said—

And even where the person aggrieved was an independent Rajah against whom the East India Company made war and having made him prisoner, seized his property, it was apparently considered by Sir John Romilly M R. in *Ex Rajah of Coorg v East India Company*³ that the company, notwithstanding that this act was an act of State could have been sued in respect of any property seized by them which belonged to the rajah in his private capacity as his personal property and not in his character of rajah.

We think it is clear on a review of these authorities that whichever view be taken, that of the Privy Council and the House of Lords, or that of Chief Justice Marshall, these petitioners who were in *de facto* possession of the disputed lands, had rights in them which they could have enforced up to 26th January, 1950, in the Dominion Courts against all persons except possibly the Rulers who granted the land and except possibly the State. We do not by any means intend to suggest that they could not have enforced them against the Rulers and the Dominion of India as well but for reasons which we shall presently disclose it is not necessary to enter into that particular controversy. It is enough for the purposes of this case to hold that the petitioners had, at any rate, the rights defined above.

Now what was the extent of the petitioner's rights? These properties were not State properties in the sense of public buildings and so forth. They were indisputably properties over which the Rulers had absolute rights of disposition at the date of the grants. The grants are absolute in character and would under any civilised system of law pass an absolute and indefeasible title to the grantee. Let it be conceded, as was argued (though we do not so decide, that they were defeasible at the mere will of a sovereign who held absolute and despotic sway over his subjects in all domestic concerns. The fact remains that up till that time they were neither resumed by the former rulers nor confiscated by the Dominion of India as an act of State. Therefore, up to the 25th of January, 1950, the right and title of the petitioners to continue in possession was good, at any rate, against all but the Rulers and the Dominion of India.

Now, what effect did the Constitution have on that? In our opinion, the Constitution, by reason of the authority derived from, and conferred by, the peoples of this land blotted out in one magnificent sweep all vestiges of arbitrary and

¹ (1936) 1 M L A 175 at 74-75

² 1 R. (1921) 2 A C. 262

³ (1860) 29 Beav. 300

despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State now seeks to uphold. Let it be conceded (without admitting or deciding the point) that the Dominion of India once had the powers for which the Union Government now contends. The self-same authorities which appear to concede that power also admit that it can be waived or relinquished. What then was the attitude of the Dominion towards those States which it sought to draw into the Republic of India which was yet to be free, sovereign, democratic, as its Constitution later proclaimed it to be? We quote from the mouth piece of that Government as disclosed in the White Paper on Indian States published by official authority, Sardar Vallabhbhai Patels statement (he was then in charge of the States Department) of 5th July, 1947, is reproduced at page 157. He said at page 158—

“This country with its institutions is the proud heritage of the people who inhabit it. It is an accident that some live in the States and some in British India but all alike partake of its culture and character. We are all knit together by bonds of blood and feeling no less than of self interest. None can segregate us into segments. No impassable barriers can be set up between us. I suggest that it is therefore better for us to make laws using together as friends than to make treaties as aliens. I invite my friend the Rulers of States and the people to the Councils of Constituent Assembly in this spirit of friendliness and co-operation in a joint endeavour inspired by common allegiance to our mother land for the common good of us all.

This invitation was accepted on 19th May, 1949. Page 109 of the White Paper says—

“As the States came closer to the Centre it became clear that the idea of separate Constitutions being framed for different constituent units of the Indian Union was a legacy from the Rulers polity which could have no place in a democratic set up. The matter was therefore further discussed by the Ministry of States with the Premiers of Unions and States on 19th May 1949 and it was decided, with their concurrence, that the Constitution of the States should also be framed by the Constituent Assembly of India and should form part of the Constitution of India.

It is impossible to think of those who sat down together in the Constituent Assembly, and of those who sent representatives there as conqueror and conquered, as those who ceded and as those who absorbed as sovereigns or their plenipotentiaries, contracting alliances and entering into treaties as high contracting parties to an act of State. They were not there as sovereign and subject, as citizen and alien but as the sovereign peoples of India, free democratic equals, forging the pattern of a new life for the common weal. Every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who through their representatives in the Constituent Assembly hammered out for themselves a new Constitution in which all were citizens in a new order, having but one tie, and owing but one allegiance—devotion, loyalty, fidelity, to the Sovereign Democratic Republic that is India. At one stroke all other territorial allegiances were wiped out and the past was obliterated except where expressly preserved, at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis—the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.

The Preamble to the Constitution recites in its magnificent prelude—

“We, the People of India having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens

Justice,
Liberty,
Equality,
Fraternity

In our Constituent Assembly this 26th day of November, 1949 do hereby Adopt, Enact and Give to Ourselves This Constitution²

Article 1 (1) sets out that India shall be a Union of States and clauses (2) and (3) define the territories of which India shall be composed. They include the territories in which the disputed lands are situated. Article 5 defines Indian citizens. They include in their wide embrace the Rulers of Charkhari and Sarila who made the grants, the petitioners who received them and those who now seek an act of State to make the confiscation. It is impossible for a sovereign to exercise an act of State against its own subjects. However, disputable the proposition may be that an act of State can be exercised against a citizen who was once an alien the right being only in abeyance till exercised, there has never been any doubt that it can never be exercised against one who has always been a citizen from the beginning in territory which has from its inception belonged to the State seeking to exercise the right. This is so even on the English authorities which claim far higher rights for the State than other laws seem to allow. Lord Atkinson said in *Johnstone v Pedlar*¹ at page 281—

The last words of Lord Halsbury's judgment clearly suggest that the Government of this country cannot assert as a defence against one of their own subjects that an act done to the latter's injury was an act of State since such a subject clearly could not rely on his own sovereign bringing diplomatic pressure against himself to right the subject's wrong. In conformity with this principle it was held in *Walker v Baird*³ that where the plaintiffs are British subjects in an action for trespass committed within British territory in time of peace it is no answer that the trespass was an act of State and that thereby the jurisdiction of the municipal Courts was ousted.⁴ And so Lord Phillimore said at page 295—

Because between Her Majesty and one of her subjects there can be no such thing as an act of State.

Lord Brougham went further in *Mayor of Lyons v East India Company*⁵ and extended the principle to aliens who later became citizens. He said at pages 284 and 285—

But this position seems wholly untenable, for all the authorities lay it down that upon a conquest the inhabitants *ante nati* as well as *post nati*, of the conquered country become denizens of the conqueror's country, and to maintain that the conquered people become aliens to their new sovereignty upon his accession to the dominion over them, seems extremely absurd. The Court below, it must be observed distinctly admit that conquest operates what they term a virtual naturalization.⁶

But however that may be, there is no question of conquest or cession here. The new Republic was born on 26th January, 1950, and all derived their rights of citizenship from the same source and from the same moment of time, so also, at the same instant and for the same reason, all territory within its boundaries became the territory of India. There is, as it were, from the point of view of the new State, Unity of Possession, Unity of Interest, Unity of Title and Unity of Time.

This was also quite clearly the will of the Union Government as expressed in its White Paper, so even if the case was still one of cession there is clear evidence of relinquishment and waiver. At page 115 it is said—

"With the inauguration of the new Constitution the merged States have lost all vestiges of existence as separate entities."

1 L.R. (1921) 2 A.C. 262

2 L.R. (1892) A.C. 491

3 (1836) 1 M.I.A. 175

and at page 130—

“The new Constitution of India gives expression to the changed conception of Indian unity brought about by the ‘unionisation’ of States

and at page 131—

“Unlike the scheme of 1935 the new Constitution is not an alliance between democracies and dynasties but a real union of the Indian people built on the concept of the sovereignty of the people

All the citizens of India, whether residing in States or Provinces will enjoy the same fundamental rights and the same legal remedies to enforce them. In the matter of their constitutional relationship with the Centre and in their internal set up, the States will be on a par with the Provinces. The new Constitution therefore finally eradicates all artificial barriers which separated the States from Provinces and achieves for the first time the objective of a strong, united and democratic India built on the true foundations of a co-operative enterprise on the part of the peoples of the Provinces and the States alike.

But we do not found on the will of the Government. We are no longer concerned with principalities and powers. We have upon us the whole armour of the Constitution and walk from henceforth in its enlightened ways, wearing the breastplate of its protecting provisions and flashing the flaming sword of its inspiration.

It was not denied that if the present action of the State cannot be defended as an act of State it cannot be saved under any provision of law. Whether the State would have the right to set aside these grants in the ordinary Courts of the land, or whether it can deprive the petitioners of these properties by legislative process, is a matter on which we express no opinion. It is enough to say that its present action cannot be defended. Article 31 (1) of the Constitution is attracted as also Article 19 (f). The petitioners are accordingly entitled to a writ under Article 32 (2). A writ will accordingly issue restraining the State of Uttar Pradesh from giving effect to the orders complained of and directing it to restore possession to the petitioners if possession has been taken.

The petitioners will be paid their costs by the State of Uttar Pradesh. The intervener will bear its own.

Petition allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —S R DAS, GIRILAM HASAN AND B JAGANNADHAS JJ

Vashist Narain Sharma

*Appellant**

v

Dev Chandra and others

Respondents.

Representation of the People Act (XLIII of 1951) section 100 (1) (c)—Election when can be held to be wholly void—Considerations and onus as to election result having been materially affected

Before an election can be declared to be wholly void under section 100 (1) (c), the Tribunal must find that the result of the election has been materially affected. These words indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate. The language of section 100 (1) (c) of the Representation of the People Act, 1951, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected by the improper acceptance of nomination.

If the objector fails to discharge that onus the election must be allowed to stand

Appeal by Special Leave granted by the Supreme Court of India by its Order dated the 29th May, 1953, from the Judgment and Order dated the 4th May, 1953 of the Election Tribunal, Allahabad in Election Petition No 270 of 1952

C K Daphtary, Solicitor General for India (*G C Mathur* and *C P Lal*, Advocates, with him) for Appellant

Naunil Lal, Advocate for Respondents Nos 1 to 4

The Judgment of the Court was delivered by

Ghulam Hasan J—This appeal preferred under Article 136 of the Constitution against the order dated May 4 1951, of the Election Tribunal Allahabad, setting aside the election of *Sri Vashist Narain Sharma*, to the U P Legislative Assembly, raises two questions for consideration. The first question is whether the nomination of one of the rival candidates, *Dudh Nath* was improperly accepted by the Returning Officer and the second, whether the result of the election was thereby materially affected

Eight candidates filed nominations to the U P State Legislative Assembly from Ghazipur (South East) Constituency No 345, three withdrew their candidature and the contest was confined to the remaining five. The votes secured by these candidates were as follows—

1	Vashist Narain Sharma	12868
2	Vireshwar Nath Rai	10996
3	Mahadeo	3950
4	Dudhnath	1983
5	Gulab Chand	1768

They were arrayed in the election petition as respondents 1 to 5 respectively. The first respondent having secured the highest number of votes was declared duly elected. Three electors filed a petition under section 81 of the Representation of the People Act (Act XLIII of 1951) praying that the election of the returned candidate be declared void and that respondent 2 be declared to have been duly elected, in the alternative, that the election be declared wholly void. The election was sought to be set aside on the grounds, *inter alia*, that the nomination of respondent 4 was improperly accepted by the Election Officer and that the result of the election was thereby materially affected. The Tribunal found that respondent 4, whose name was entered on the electoral roll of Galimar Constituency Ghazipur (South East) 'personated' (meaning passed himself off as) *Dudh Nath Kahar* and used the entries of his electoral roll of Barun Constituency Ghazipur (South West), that the Returning Officer had improperly accepted his nomination, and that the result of the election was thereby materially affected. Allegations of major and minor corrupt practices and non compliance with certain statutory rules were made but the Tribunal found in favour of the returned candidate on those points.

Dudh Nath respondent 4 is Rajput by caste. His permanent or ancestral home is Galimar but since 1913 he had been employed as a teacher in the Hindu Higher Secondary School at Zamana—a town 10 or 12 miles away—and he had been actually residing at village Barun which is quite close to Zamana. The person for whom *Dudh Nath* 'personated' is *Dudh Nath Kahar* whose permanent house is at Jamuan, but his father lives at Barun. *Dudh Nath Kahar* used to visit Barun off and on but he was employed at Calcutta. The nomination paper

filed by Dudh Nath gave his parentage and age which more properly applied to Dudh Nath Kahar. He gave his father's name as Shiv Deni alias Ram Krit. Ram Krit is the name of Dudh Nath Kahar's father. The electoral roll (Exhibit K) of Gahmar gives Dudh Nath's father's name as Shio Deni with no alias and his age as 39 while the electoral roll of Pargana Zamania Mouza Baruan (Exhibit C) gives Dudh Nath's father's name as Ramkrit and his age as 31. In the electoral roll of Jamuan Dudh Nath's age is entered as 34 but in the supplementary list it is mentioned as 30. When the nomination paper was filed on November 24, 1951, at 2-20 P.M. it was challenged by Vire-hwar Nath Rai on the ground that Dudh Nath's father's name was Shivadeni and not Ramkrit but no proof was given in support of the objection and it was overruled on November 27. This order was passed at 1 P.M. One of the candidates, who later withdrew, filed an application at 3-25 P.M. before the Returning Officer offering to substantiate the objection which the objector had not pressed. This application was rejected on the ground that the nomination had already been declared as valid. In point of fact no evidence was adduced. This acceptance of the nomination on the part of the Returning Officer is challenged as being improper under section 36 (6) of the Representation of the People Act and as the result of the election according to the objector has been materially affected by the improper acceptance of this nomination, the Tribunal is bound to declare the election to be wholly void under section 100 (1) (c) of the Act. Mr. Daphtary on behalf of the appellant has argued before us with reference to the provisions of sections 33 and 36 that this is not a case of improper acceptance of the nomination paper because *prima facie* the nomination paper was valid and an objection having been raised but not pressed or substantiated, the Returning Officer had no option but to accept it. There was, as he says nothing improper in the action of the Returning Officer. On the contrary, it may, according to him, be more appropriately described as a case of an acceptance of an improper nomination paper by the Returning Officer, inasmuch as the nomination paper contained an inherent defect which was not discernible *ex facie* and could be disclosed only upon an enquiry and upon the taking of evidence as to the identity which was not then forthcoming. Such a case, it is argued, is not covered by section 100 (1) (c) but by section 100 (2) (c) in which case the election of the returned candidate is alone to be declared void, whereas in the former case the election is wholly void. We do not propose to express any opinion upon this aspect of the matter, as in our view the appeal can be disposed of on the second question.

Section 33 of the Representation of the People Act, 1951, deals with the presentation of nomination paper and lays down the requirements for a valid nomination. On the date fixed for scrutiny of the nominations the Returning Officer is required to examine the nomination paper and decide all objections which may be made to any nomination, and after a summary inquiry if any, as he thinks necessary he is entitled to refuse nomination on certain grounds mentioned in sub section (2) of section 36. Sub section (6) lays down that the Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection. This sub section shows that where the nomination paper is accepted, no reasons are required to be given. Section 100 gives the grounds for declaring an election to be void. The material portion is as follows —

(1) If the Tribunal is of opinion—

(a)

(b)

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination the Tribunal shall declare the election to be wholly void

It is under this sub section that the election was sought to be set aside

Before an election can be declared to be wholly void under section 100 (1) (c), the Tribunal must find that "the result of the election has been materially affected". These words have been the subject of much controversy before the Election Tribunals and it is agreed that the opinions expressed have not always been uniform or consistent. These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate. The next question that arises is whether the burden of proving this lies upon the petitioner who objects to the validity of the election. It appears to us that the volume of opinion preponderates in favour of the view that the burden lies upon the objector. It would be useful to refer to the corresponding provision in the English Ballot Act 1872 section 13 of which is as follows —

'No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act or any mistake in the use of the forms in the second schedule to this Act if it appears to the Tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.'

This section indicates that an election is not to be declared invalid if it appears to the Tribunal that non-compliance with statutory rules or any mistake in the use of such forms did not affect the result of the election. This throws the onus on the person who seeks to uphold the election. The language of section 100 (1) (c) however, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected. On the contrary under the English Act the burden is placed upon the respondent to show the negative, viz., that the result of the election has not been affected. This view was expressed in *Rai Bahadur Surendra Narayan Sinha v Amulyadhare Roy and Others*¹, by a tribunal presided over by Mr (later Mr Justice) Roxburgh. The contention advanced in that case was that the petitioner having established an irregularity it was the duty of the respondent to show that the result of the election had not been materially affected thereby. The Tribunal referred to the provisions of section 13 of the Ballot Act and drew a distinction between that section and the provisions of paragraph 7 (1) (c) of Corrupt Practices Order which was more or less on the same lines as section 100 (1) (c). They held that the onus is differently placed by the two provisions. While under the English Act the Tribunal hearing an election petition is enjoined not to interfere with an election if it appears to it that non-compliance with the rules or mistake in the use of forms did not affect the result of the election, the provision of Paragraph 7 (1) (c) placed the burden on the petitioner. The Tribunal recognised the difficulty of offering positive

¹ *Ind on Election Cases* by Sen and Poddar, page 183

proof in such circumstances but expressed the view that they had to interpret and follow the rule as it stood

In *C M Karale v Mr B K Dalvi etc*¹ the Tribunal held that the onus of proving that the result had been materially affected rests heavily on the petitioner of proving by affirmative evidence that all or a large number of votes would have come to the returned candidate if the person whose nomination had been improperly accepted had not been in the field

In *Babu Basu Sinha v Babu Rajandhari Sinha etc*², it was emphasized that it is not enough for the petitioner to show that the result of the election might have been affected but he must show that it was actually affected thereby

The case of *Jagdish Singh v Shri Rudra Deolal etc*³ was one under section 100 (1) (c) of the Representation of the People Act. It was held that the question should always be decided on the basis of the material on the record and not on mere probabilities. The Tribunal distinguished between an improper rejection and an improper acceptance of nomination observing that while in the former case there is a presumption that the election had been materially affected in the latter case the petitioner must prove by affirmative evidence though it is difficult, that the result had been materially affected

The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways

(1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,

(2) where the person referred to above secured more votes and

(3) where the person whose nomination has been improperly accepted is the returned candidate himself

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. So far as the third case is concerned it may be readily conceded that such would be the conclusion. But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon

1 *Doabias Election Cases* Vol 1 (p 178)

3 *Gazette of India (Extraordinary)* October,

2 *Indian Election Petitions* (Vol III) by 13 1953

Shri Jagat Narain page 80

him by section 100 (1) (c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand.

In two cases [*Lalhan Lal Mishra v. Tribeni Kumar, etc.*¹ and *Mandal Sumitra Devi v. Sri Surajnarain Singh, etc.*²] the Election Tribunal, Bhagalpur, had to consider the question of improper acceptance of the nomination paper. They agreed that the question whether the result of election had been materially affected must be proved by affirmative evidence. They laid down the following test —

If the number of votes secured by the candidate, whose nomination paper has been improperly accepted, is lower than the difference between the number of votes secured by the successful candidate and the candidate who has secured the next highest number of votes it is easy to find that the result has not been materially affected. If however the number of votes secured by such a candidate is higher than the difference just mentioned it is impossible to foresee what the result would have been if that candidate had not been in the field. It will neither be possible to say that the result would actually have been the same or different nor that it would have been in all probability the same or different.

In both the cases the margin of votes between the successful candidates and the next highest candidate was less than the number of votes secured by the candidate whose nomination was improperly accepted. They held that the result was materially affected. We are unable to accept the soundness of this view. It seems to us that where the margin of votes is greater than the votes secured by the candidate whose nomination paper had been improperly accepted, the result is not only materially not affected but not affected at all, but where it is not possible to anticipate the result as in the above mentioned cases, we think that the petitioner must discharge the burden of proving that fact and on his failure to do so, the election must be allowed to stand.

The Tribunal in the present case rightly took the view that they were not impressed with the oral evidence about the probable fate of votes wasted on Dudh Nath Singh, but they went on to observe

Considering that Dudh Nath respondent No. 4 received more votes than the margin of votes by which respondent No. 1 was returned we are constrained to hold that there was reasonable possibility of respondent No. 2 being elected in place of respondent No. 1, had Dudh Nath not been in the field.

We are of opinion that the language of section 100 (1) (c) is too clear for any speculation about possibilities. The section clearly lays down that improper acceptance is not to be regarded as fatal to the election unless the Tribunal is of opinion that the result has been materially affected. The number of wasted votes was 111. It is impossible to accept the *ipse dixit* of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination

¹ *Gazette of India (Extraordinary)* February 2, 1953

² *Gazette of India (Extraordinary)* February 26, 1953

paper, but neither the Tribunal nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the Legislature to consider. The English Act to which we have referred presents no such conundrum and lays down a perfectly sensible criterion upon which the Tribunal can proceed to declare its opinion. It directs the Tribunal not to set aside the election if it is of opinion that the irregularity has not materially affected the result.

Mr Naunil Lal argued that the finding that the result of the election has been materially affected is a finding of fact which this Court should not interfere with in special appeal but there is no foundation for the so-called finding of fact. If the Tribunal could not be sure that the respondent 1 would get only 56 out of the wasted votes to give him an absolute majority, how could the Tribunal conjecture that all the wasted votes would go to the second best candidate.

The Tribunal misdirected itself in not comprehending what they had to find and proceeded merely upon a mere possibility. Their finding upon the matter is speculative and conjectural.

Mr Naunil Lal also attempted to argue that he could support the decision of the Tribunal on other grounds which had been found against him and referred to the analogy of the Code of Civil Procedure which permits a respondent to take that course. That provision has no application to an appeal granted by special leave under Article 136. We have no appeal before us on behalf the respondents and we are unable to allow that question to be reargued.

The result is that we set aside the order of the Tribunal and hold that it is not proved that the result of the election has been materially affected by an improper acceptance of the nomination assuming that the case falls within the purview of section 30-6 and that finding is correct.

We accordingly set aside the order of the Tribunal and uphold the election of the appellant. The appellant will get his costs from the respondents incurred here and in the proceedings before the Tribunal.

Appeal allowed

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT —MEHR CHAND MAHAJAN *Chief Justice* B K MUKHERJEA VIVIAN BOSE N H BHAGwati AND T L VENKATARAMA Aiyar JJ
Durga Shankar Mehta

*Appellant**

Thakur Raghuraj Singh and Others

Respondents

Reference is to the People's Act VIII of 1951 sections 80 and 100. Scope and effect—If the power of Supreme Court under Article 136 of the Constitution of India 1950 to interfere by way of special leave with decisions of the Election Tribunal.

Reference is to the People's Act (VIII of 1951) s 80 and 100 (1) (c) and (2) (c)—Scope.

Section 80 of the Representation of the People Act, 1951 which is worded almost in the same manner as Article 9 (5) provides that no election shall be called in question except by an election petition presented in accordance with the provisions of this Part and section 100 says that every order of the Tribunal made under this Act shall be final and conclusive. But it cannot be said that the Supreme Court has no jurisdiction to interfere with the orders of the election tribunal by way of special leave under Article 136 of the Constitution.

The Election Tribunal is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of the Supreme Court to grant special leave in proper cases would certainly be attracted and this power could not be excluded by any parliamentary legislation. The *non obstat* clause with which Article 329 of the Constitution begins debars any Court or Tribunal including the Supreme Court to entertain a suit or proceeding calling in question a selection to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and *non est* *non est* may be provided by Statute. But once the Tribunal has made any determination on a judicial question on the matter the powers of the Supreme Court to interfere by way of special leave can always be exercised.

The powers conferred by Article 136 of the Constitution are in the nature of special or residuary power which are exercisable outside the purview of ordinary law in cases where the needs of justice demand interference by the Supreme Court of the land. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against an *interlocutory* or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. Section 103 of the Representation of the People Act, 1951, certainly gives finality to the decisions of the Election Tribunals so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which the Supreme Court can exercise in the matter of granting special leave under Article 136 of the Constitution. This overriding power which has been vested in the Supreme Court under Article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England. The prerogative of the Crown can be taken away or curtailed by legislation but Article 136 of the Constitution is a constitutional provision which no Parliamentary legislation can limit or take away.

The electoral roll is conclusive as to the qualification of the elector except where disqualification is expressly alleged or proven. Where a person under age is shown as having been of proper age in the electoral rolls and no objection is taken to his nomination, it cannot be said that his nomination was improperly accepted by the Returning Officer within the meaning of section 100 (1) (c) of the Representation of the People Act, 1951, so as to render the whole election void. In such a case the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. Such a case comes under sub-section (2) (c) of section 100 and not under sub-section (1) (c) of that section. Only the election of the disqualified candidate must be declared void.

Appeal by Special Leave granted by Order of this Court, dated the 13th May, 1953, from the judgment and order, dated the 30th April, 1953, of the Election Tribunal, Jabalpur at Nagpur, in Election Petition No. 1 of 1952.

B. Sen T. P. Nair and I. A. Shroff, Advocates, for Appellant.

R. M. Hazarnani, J. B. Dadachani and Rajinder Narain, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Mulherjee J.—This appeal, which has come before us on special leave, is directed against the judgment and order of the Election Tribunal, Jabalpur at Nagpur, dated the 30th April, 1953, whereby the Tribunal declared the election held on the 29th December, 1951, for the double member Lakhnadon Legislative Assembly Constituency, to be wholly void under section 100 (1) (c) of the Representation of the People Act (hereinafter called 'The Act.')

To appreciate the contentions that have been raised by the parties to this appeal, it would be necessary to state briefly the material facts. The Lakhnadon Legislative Assembly Constituency in Madhya Pradesh is a double member constituency, one of the seats in which is reserved for scheduled tribes. The appellant and respondents Nos. 1, 3, 5 and 7 were duly nominated candidates for the general seat in the said constituency, while respondents Nos. 2, 4 and 6 were

nominated for the reserved seat. No objection was taken before the Returning Officer in respect of the nomination of either the appellant or respondent No. 2 Vasant Rao. Out of these eight candidates, respondents Nos. 5, 6 and 7 withdrew their candidature within the prescribed period under section 37 of the Act and the actual contest at the election was between the remaining five candidates, namely, the appellant and respondents Nos. 1 to 4. The votes secured by these five candidates at the polling were found to be as follows:

(1) The Appellant (General)	18,627
(2) Respondent No. 1 (General)	7,811
(3) Respondent No. 2 (Reserved)	14,442
(4) Respondent No. 3 (Reserved)	7,877
(5) Respondent No. 4 (General)	6,604

Accordingly the appellant and respondent No. 2 were declared elected to the General and Reserved seat respectively, under section 66 of the Act, and the results were duly published in the Madhya Pradesh Gazette on 8th of February, 1952. On the 14th of May, 1952, the respondent No. 1 Raghuraj Singh filed an election petition against the appellant and the other respondents, under section 81 of the Act, praying that the said election to the Lakhnadon Legislative Assembly Constituency be declared wholly void or in the alternative the election of Vasant Rao and/or that of the appellant Durga Shankar Mehta be declared void. There was a string of allegations made in the petition accusing the appellant of various corrupt practices in the matter of securing votes but none of these are material for our present purpose, as the Tribunal, by a majority, held these allegations to be unfounded and not supported by proper evidence. The substantial ground upon which the petitioner sought to assail the validity of the election was, that the respondent No. 2 Vasant Rao, who was declared duly elected to the Reserved seat in the said constituency was, at all material times, under 25 years of age and was consequently not qualified to be chosen to fill a seat in the Legislative Assembly of a State under Article 173 of the Constitution. This allegation was found to be true by the majority of the Tribunal and by its judgment dated the 30th of April, 1953, the Tribunal came to the conclusion that the act of the Returning Officer in accepting the nomination of Vasant Rao, who was disqualified to be elected a member of the State Legislature under the Constitution, amounted to an improper acceptance of nomination within the meaning of section 100 (1) (c) of the Act and as the result of the election was materially affected thereby, the whole election must be pronounced to be void. It is the propriety of this decision that has been challenged before us in this appeal.

Mr. Hazarnavis appearing for the respondent No. 1 before us, took a preliminary point challenging the competency of the appeal. It is contended by the learned counsel, that Article 329 (b) of the Constitution ousts the jurisdiction of all ordinary Courts in election disputes and provides expressly that no election to either House of Parliament or to either House of the Legislature of a State shall be called in question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. It is urged that there can be no challenge to the validity of an election except by way of an election petition, and the authority to which, and the manner in which, such petition is to be presented, have been embodied in the Representation of the People Act which has been enacted by the Parliament.

under Article 327 of the Constitution. Section 80 of the Act, which is worded almost in the same manner as Article 329 (b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part" and section 105 says that "every order of the Tribunal made under this Act shall be final and conclusive". It is contended by the learned counsel that the jurisdiction that is created in the Election Tribunal is a special jurisdiction which can be invoked by an aggrieved party only by means of an election petition and the decision of the Tribunal is final and conclusive.

These arguments though apparently attractive, appear to us on closer examination to be untenable. We agree with the learned counsel that the right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right no other remedy by ordinary action in a Court of law is available to a person in regard to election disputes. The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction, but once it is held that it is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election the overriding power of this Court to grant special leave in proper cases would certainly be attracted and this power cannot be excluded by Parliamentary legislation. The *non obstante* clause with which Article 329 of the Constitution begins and upon which the respondent's counsel lays so much stress debars us as it debars any other Court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised. It is now well settled by the majority decision of this Court in the case of *Bharat Bank Ltd v Employees of the Bharat Bank Ltd*¹ that the expression "Tribunal" as used in Article 136 does not mean the same thing as Court but includes, within its ambit, all adjudicating bodies provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions. The only Courts or Tribunals, which are expressly exempted from the purview of Article 136, are those which are established by or under any law relating to the Armed Forces as laid down in clause (c) of the Article. It is well known that an appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself. The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The Article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and bearing appeals, by granting of special leave, against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this Article in any way. Section 105

of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this Court can exercise in the matter of granting special leave under Article 136 of the Constitution

This overriding power, which has been vested in the Supreme Court under Article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England. The prerogative of the Crown can be taken away or curtailed by express legislation and even when there are no clear words in a particular statute expressly taking away the Crown's prerogative of entertaining an appeal but the scheme and purpose of the Act show unmistakably that there was never any intention of creating a Tribunal with the ordinary incident of an appeal to the Crown annexed to it the Privy Council would not admit an appeal from the decision of such Tribunal. This is illustrated by the decision of the Privy Council in *Theberge v. Laundry*¹, upon which Mr Hazarenavis places considerable reliance. In that case the petitioner having been declared duly elected a member to represent the electoral district of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards on petition declared null and void by judgment of the Superior Court under the Quebec Controverted Elections Act 1875 and he himself was declared guilty of corrupt practices. He applied for special leave to appeal to His Majesty in Council. The application was refused and Lord Cairns in delivering the judgment of the Board held, that although the prerogative of the Crown could not be taken away or limited except by express words and the relevant section of the Quebec Controverted Elections Act of 1875 providing that "such judgment shall not be susceptible of appeal" did not mention either the Crown or its prerogative, yet the fair construction of the above Act as also of the previous Act of 1872 was that it was the intention of the Legislature to create a Tribunal for the purpose of trying election petitions in a manner which would make its decision final for all purposes and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

This decision in our opinion does not assist Mr Hazarenavis. In the first place Article 136 is a constitutional provision which no Parliamentary legislation can limit or take away. In the second place the provision being one which overrides ordinary laws, no presumption can arise from words and expressions declaring an adjudication of a particular Tribunal to be final and conclusive, that there was an intention to exclude the exercise of the special powers. As has been said already, the *nonobstante* clause in Article 329 prohibits challenge to an election either to Parliament or any State Legislature except in the manner laid down in clause (2) of the Article. But there is no prohibition of the exercise of its powers by the Supreme Court in proper cases under Article 136 of the Constitution against the decision or determination of an Election Tribunal which like all other judicial Tribunals comes within the purview of the Article. It is certainly desirable that the decisions on matters of disputed election should as soon as possible, become final and conclusive so that the constitution of the Legislature may be distinctly and speedily known. But the powers under Article 136 are exercisable only under exceptional circumstances. The Article does not create any general right of appeal

from decisions of all Tribunals. As regards the decision of this Court in *Ponnuswami v. Returning Officer, Namakkal Constituency and others*¹, to which reference has been made by the learned counsel, we would only desire to point out that all that this case decided was that the High Court had no jurisdiction, under Article 226 of Constitution, to interfere by a writ of *certiorari*, with the order of a Returning Officer who was alleged to have wrongly rejected the nomination paper of a particular candidate. It was held that the word "election" in Article 329 (b) of the Constitution had been used in the wide sense to connote the entire process, culminating in a candidate's being declared elected and that the scheme of Part XV of the Constitution was that all matters which had the effect of vitiating election should be brought up only after the election was over and by way of an election petition. The particular point which arises for consideration here, was not decided in that case and was expressly left open. In our opinion therefore the preliminary point raised by Mr Hazarnavis cannot succeed.

Coming now to the appellant's case, Mr Sen who appeared in support of the appeal, has pressed only one point for our consideration. He plainly stated that he could not challenge the propriety of the finding, arrived at by the majority of the Tribunal that respondent Vasant Rao was below 25 years of age at all material times. Thus he concedes is a finding of fact and being based on evidence, is not open to challenge before us in an appeal by special leave. His contention in substance is that there has been no improper acceptance of nomination in the present case as has been held by the Tribunal and consequently the provision of section 100 (1) (c) of the Act would not be attracted to it and the entire election could not have been declared void. It is true, says the learned counsel, that on the finding of the Tribunal there has been a violation of or non-compliance with the provision of section 173 of the Constitution and as respondent No. 2 suffers from a constitutional disability by reason of his under age and is not qualified to be chosen to fill a seat in the Legislative Assembly of a State, his election can undoubtedly be declared void under section 100 (2) (c) of the Act, but there was no justification for pronouncing the whole election, including that of the appellant, to be void. The whole controversy thus centres round the point as to whether, upon the facts admitted and proved, the present case comes within the purview of sub-section (1) (c) of section 100 of the Act or of sub-section (2) (c) to the same section. The relevant portions of section 100 of the Act so far as are material for our present purpose may be set out as follows —

"100. Grounds for declaring election to be void—

(1) If the Tribunal is of opinion—

(a)

(b)

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void.

(2) Subject to the provisions of sub-section (3) if the Tribunal is of opinion—

(a)

(b)

(c) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any

other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void.

The first point for our consideration is whether the nomination of Vasant Rao was improperly accepted by the Returning Officer and that has materially affected the result of the election. It is not suggested on behalf of the respondent that the nomination paper filed by Vasant Rao was in any manner defective. It is admitted that the names and electoral numbers of the candidate and his proposer and seconder as entered there were the same as those entered in the electoral rolls. It is also not disputed that the nomination paper was received within proper time as is laid down in section 33, sub section (4) of the Act. Section 36 of the Act provides for scrutiny of nominations and under sub section (2) the Returning Officer has got to examine the nomination papers and decide all objections that may be made to any nomination and he may either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the grounds which are specified in the different clauses of the sub section. The ground mentioned in clause (a) of the sub section is, that the candidate is not qualified to be chosen to fill the seat under the Constitution or the Act. The contention of the respondent No. 1 is that the nomination of Vasant Rao should have been rejected on this ground and as the Returning Officer did not do that, his act amounted to an improper acceptance of nomination within the meaning of section 100 (1) (c) of the Act. We do not think that this contention is sound. If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36, sub-section (7) of the Act which runs as follows :

(7) For the purposes of this section—

(a) the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election or to subscribe a nomination paper as the case may be unless it is proved that the candidate is disqualified under the Constitution or this Act or that the proposer or seconder as the case may be, is disqualified under sub section (2) of section 33.

In other words, the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The electoral roll in the case of Vasant Rao did describe him as having been of proper age and on the face of it therefore he was fully qualified to be chosen a member of the State Legislative Assembly. As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, the latter was bound to take the entry in the electoral roll as conclusive and if in these circumstances he did not reject the nomination of Vasant Rao, it cannot be said that this was an improper acceptance of nomination on his part which section 100 (1) (c) of the Act contemplates. It would have been an improper acceptance if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as

to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. In our opinion Mr. Sen is right that a case of this description comes under sub-section (2) (c) of section 100 and not under sub-section (1) (c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution, and that is one of the grounds specified in clause (c) of sub-section (2). The expression "non-compliance with the provisions of the Constitution" is in our opinion sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all. The English law after the passing of the Ballot Act of 1872 is substantially the same as has been explained in the case of *Stoue v. Jolliffe*¹. The register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament.

It is argued on behalf of the respondent that the expression "non-compliance" as used in sub-section (2) (c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "non-compliance" and "non-observance" or "breach" and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause. When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to declare his election to be void. Under section 98 of the Act this is one of the orders which the Election Tribunal is competent to make. If it is said that section 100 of the Act enumerates exhaustively the grounds on which an election could be held void either as a whole or with regard to the returned candidate, we think that it would be a correct view to take that in the case of a candidate who is constitutionally incapable of being returned as a member there is non-compliance with the provisions of the Constitution in the holding of the election and as such sub-section (2) (c) of section 100 of the Act applies. The result therefore is that in our opinion the contention of the appellant succeeds. We allow the appeal in part and modify the order of the Election Tribunal to this extent that the election of respondent No. 2 Vasant Rao only is declared to be void, the election of the appellant however will stand. We make no order as to costs of this appeal.

Appeal allowed in part.

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TABLE OF CASES REPORTED.

SUPREME COURT OF INDIA.

PAGES.

Aftab Ahmad Khan v The State of Hyderabad	(S C.)	655
Ashalata Debi v Jadu Nath Roy	(S C.)	690
Basappa v Nagappa	(S C.)	695
Durga Shankar Mehta v Thakur Ragburaj Singh	(S C.)	723
Kalishankar Das v Dharendra Nath Patra	(S C.)	670
R. W. Mathams v State of W Bengal	(S C.)	649
Rajnarain Singh v. Chairman, P. A. Com., Patna	(S C.)	661
State of Bombay v. Bombay Education Society	(S C.)	678
Vasist Narain Sharma v. Dev Chandra	(S C.)	717
Virendra Singh v State of U. P.	(S C.)	705

INDEX TO REPORTS.

Constitution of India (1950), Articles 19 (f) and 31 (1)—Applicability—Grants by Rulers of States before acceding to the Dominion of India—If can be set aside by the Union or State Government by "act of State" after the coming into force of the Constitution of India, 1950 (S C.) 705

Constitution of India (1950), Articles 29 (2), 30 (1) and 337—Order issued by Bombay Government confining admission to English medium schools to children belonging to the Anglo-Indian and European communities—Validity (S C.) 678

Constitution of India (1950), Articles 226 and 32—Scope—Interference by issuing writs of *certiorari*—Grounds—Decision of Election Tribunal—When can be quashed by writ of *certiorari* (S C.) 695

Criminal Procedure Code (V of 1898), sections 235 and 233—Respective scope—Criminal Trial—Judgment on appeal—Requirements—Sentence—Death penalty—Confirmation by third Judge on appeal on difference of opinion between the two Judges—Proper order to pass (S C.) 655

Criminal Procedure Code (V of 1898), section 257—Requirements of—Non-compliance with—Effect (S C.) 649

Hindu Law—Limited owner—Alienation by—How far binding—Then reversioner joining in alienation or admitting existence of necessity—Effect—Actual reversion—If bound by admission by his father (S C.) 670

Indian Independence (Legal Proceedings), Order, 1947—Paragraph 4 (2)—Applicability—Application for re-restoration of properties by the mortgagee-purchasers on default in payment of instalments ordered under the new decree passed under the Bengal Money lenders Act (X of 1940)—Order, dated 27th September, 1947, holding that there was no default—Appeal to Calcutta High Court allowed on 27th April, 1950, holding that there was default and ordering re-restoration of properties—Bulk of the properties in Pakistan—Effect on jurisdiction of Calcutta High Court (S C.) 690

Patna Administration Act (Bihar and Orissa Act I of 1915), section 3 (1) (f)—Validity and scope—Power to the Executive authority to modify existing or future laws—*Vires*—Notification by order of Governor, Bihar, on 23rd April, 1951, picking out section 104 of Bihar and Orissa Municipal Act, 1912 and extending it with modifications to an area—Validity (S C.) 661

Representation of the People Act (XLIII of 1951), sections 80 and 105—Scope and effect—If affects power of Supreme Court under Article 136 of the Constitution of India, 1950 to interfere by way of special leave with decisions of the Election Tribunal (S C.) 723

Representation of the People Act (XLIII of 1951), section 100 (1) (c)—Election when can be held to be wholly void—Considerations and onus as to election result having been materially affected (S C.) 717

Representation of the People Act (XLIII of 1951), section 100 (1) (c) and 2 (c)—Scope (S C.) 723

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CONTENTS

				PAGES.
Articles 181—190
Reports	— 731—808

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THE SUPREME COURT JOURNAL.

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[XVII]

THE LAW OF PREVENTIVE DETENTION

By

V G RAMACHANDRAN, M.A., B.L.

(Author of *Law of Contempt of Court*)

Historical Background of Preventive Detention Law

The law of preventive detention has been now codified in a way in Article 22 of the Constitution. We can trace the history of the Law of Preventive Detention in India to as early a date as 1795. The East India Company Act, 1795 provided that "it shall and may be lawful for the Governor of Fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any British settlement or possession in India with any of the Princes, Rajas or Zamindars or any other person or persons having authority in India or with the Commanders, Governors or Presidents of any factories established in East India, by an European Power or any correspondence contrary to the rules and orders of the said company or of the Governors-General in Council of Fort William aforesaid.

There is however no record of any case in which this Act was called into force. Later on we come across The Bengal State Prisoners' Regulation of 1818 (Regulation III of 1818) whose Preamble postulated that in the interests of public tranquillity and security of the State it may be necessary to place under personal restraints individuals against whom there may not be sufficient ground to institute any judicial proceeding or that court may not be advisable but in such cases of detained persons the grounds of such determination should from time to time come under Revision and the affected persons have the right to bring to the notice of the Governor General in Council all matters connected with the supposed grounds or with the manner of execution of the restraint order, that during detention the detenu will be confined according to his status with proper allowances for his wants and those of his family, that his properties shall during detention be attached and kept under the management of the Revenue authorities, etc.

This Regulation applied to Bengal which included then Bihar and Orissa, the Uttar Pradesh and the Punjab except a few Scheduled Districts. Madras and Bombay had similar Regulations in Madras Regulation XI of 1819 and Bombay Regulation XXV of 1827.

The next statute was the State Prisoners Act, 1850 (Act XXXIV of 1859 for Bengal) and of 1858 (Act III of 1858 for Madras and Bombay) which merely enabled the prisoners to be lawfully confined in Fortress gaol or other place within the limits of the Supreme Courts of Judicature in the respective areas

The First World War brought out the need for a legislation such as The Defence of India (Criminal Law Amendment) Act of 1915 "to provide for special measures to secure the public safety and the defence of British India and for more speedy trial of certain offences"

It was provided in section 2 (1) (f) of the Act that the Governor General in Council was authorised to make rules "to empower any civil or military authority where in the opinion of such authority there are reasonable grounds for suspecting that any person has acted, is acting or about to act in a manner prejudicial to the public safety, to direct that such person shall not enter, reside or remain in any area specified in writing by such authority or that such person shall reside and remain in any area so specified, or that he shall conduct himself in such manner or abstain from such acts or take such order with any property in his possession or under the control as such authority may direct"

There was another Act the Indian Criminal Law Amendment Act XIV of 1908 which provided for more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace. The Defence of India Criminal Law Amendment Act, 1915, set out in section 3 that "the Local Government may by order in writing direct that any person accused of anything which is an offence punishable with death, transportation or imprisonment for a term which may extend to seven years, or of criminal conspiracy to commit or of abetting or of attempting to commit or abet any such offence shall be tried by commissions appointed under the Act". Then again The Anarchical and Revolutionary Crimes Act, 1919 (Act XI of 1919) provided the special law and procedure to supplement the ordinary law for dealing with subversive movements. After this came the Defence of India Act, 1939 (Act XXXV of 1939) during the Second World War to meet war emergencies to ensure public safety and defence of British India and for trial of certain offences. Section 2 (1) of the Act deals with the maintenance of public safety, public order, for securing defence of British India and efficient prosecution of the war and for maintaining supplies and services essential to the life of the community. Section 2 (2) clause (x) enacts that the rules may provide for or may empower any authority to make orders providing for "the apprehension and *detention in custody* of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area and the compelling of such person to reside and remain in any area or to do or abstain from doing anything"

Rule 26 of the Defence of India Rules was duly framed for the above purpose. But it was declared *ultra vires* in *Keshav Talpade v. Emperor*¹ in so far as it went beyond the rule making power for the detention of persons reasonably suspected of certain things was all that the Act contemplated. But the Rule over reached the Act in empowering Government to detain a person even if it was satisfied that

it was necessary to do so with a view to prevent him from acting in a manner prejudicial to any of the matters specified therein. Thus while the Act imposed a condition of 'reasonableness' the Rule advocated more 'satisfaction' of the Government.

After this decision¹ of the Federal Court, an Ordinance (No. XIV of 1943) was promulgated by the Governor General to get over the decision by substituting a new clause for clause (x) of section 2 (2) and even validating all the prior orders under rule 26. Once again the Federal Court had occasion in *Emperor v. Shibnath Banerjee*² to pronounce that 'satisfaction' of the Government that detention was necessary for preventing a person from acting in a prejudicial manner did not mean that orders of detention made in pursuance of a general order that if the police recommended detention of any person under rule 26 such person may be detained, was good at all in Law. Similarly in *Emperor v. Keshav Gokha*³ it was held that it was a condition precedent for a detention order that the authority making the order should apply his mind to the actual need for making the order. Otherwise the order of detention will be invalid for want of 'reasonable and satisfactory grounds'. If there was nothing to show that the authority came to decide on a quasi-judicial consideration of the pertinent facts or exercised his discretion after a full consideration of the facts, the order will be null and void.⁴

The Defence of India Act was repealed after the war by the Repealing and Amending Act II of 1948. But the disturbed condition of the country soon after the partition of India into Pakistan and Bharat, necessitated several security measures such as —

Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947

The Punjab Disturbed Areas Act, 1947

Assam Maintenance of Public Order Act, 1947

Bihar Maintenance of Public Order Act, 1947

Bombay Public Security Measures Act, 1947

Central Provinces and Berar Public Safety Act, 1948

Madras Suppression of Disturbance Act, 1948

Uttar Pradesh Communal Disturbance Prevention Act, 1947

Uttar Pradesh Maintenance of Public Order (Temporary) Act, 1947

West Bengal Disturbed Areas Act, 1947

West Bengal Security Act, 1948

Orissa Maintenance of Public Order Act, 1948

The above historical background is portrayed to show how from time to time established authority in India felt the need for extra powers to act in emergencies. It was either an emergency due to war or emergencies as civil strife, consequent on partition of India. If the ordinances continued it was because peace and tranquillity had not become the normal feature even after the first ebullitions of freedom in Independent India. The party in power had to combat rival disturbing forces and some individual or political parties do not seem wedded to constitutional agitation to remedy a wrong. Subversive movements, abuse of personal liberty

¹ (1943) 2 M.L.J. 90 1943 F.L.J. 28 (F.C.)

² (1943) 2 M.L.J. 463 1943 F.L.J. 151 (F.C.)

³ A.I.R. 1945 Bom. 212

⁴ See also *Kamala Kant Azad v. Emperor*,

A.I.R. 1944 Pat. 354 *Hanurshan Das v. Emperor* A.I.R. 1944 Lah. 33 (F.B.) *Emperor v. Iqbal Krishna Kapoor* A.I.R. 1942 All. 253 (2) *Emperor v. Purushotham Trkhandas*, A.I.R. 1945 Bom. 333.

and freedom of speech appear to endanger the larger fabric of a young society in civilised Renascent India. This was visualised in the disturbed conditions India was in when the Constituent Assembly met to frame the Constitution. There was no doubt a lot of discussion in the Assembly and some felt that Article 22 may be omitted. Dr Ambedkar, Chairman of the Drafting Committee, assured the House that the substance of the 'Due Process clause' was imbedded in clauses (1) and (2) of Article 22 which directed grounds of detention to be furnished to the arrested persons and production within 24 hours before a Magistrate. A three month period was fixed for reference to the Advisory Board specially created to test the case of each detenu according to a procedure to be prescribed by law.

Law of Preventive Detention in India in comparison to other countries

It must be admitted that in a chapter guaranteeing fundamental rights it is rather peculiarly anomalous that there is a short code set out embodying the principles of preventive detention. There is no such law in vogue in Federal America or in Democratic England particularly in times of peace. The recent Federal Security Act 1950, in America does make some preventive provisions to control spies and saboteurs in times of war, invasion or insurrection. But there is no such provision similar to Article 22 in the Constitution obviously to be utilized in peace time, war or emergencies. Our Legislature is empowered to enact laws for preventive detention under Entry 9, of List I and Entry 3 of List III. This is legislative power in times of peace in contradistinction to war emergencies for which other provisions exist for the suspension of the entire chapter on fundamental rights and prerogative rights¹. The object in giving a constitutional status to preventive detention seems to be to prevent anti social and subversive elements imperilling the welfare of this young Republic. Of course certain safeguards against abuse of this law of preventive detention are provided under Article 22, clauses 4 to 7. They will be discussed later. The need for preventive detention further arises in the sense that such detention of a person without trial is necessitated by the fact that the evidence in possession of the authority will not be sufficient to make a charge or to secure the conviction of a detenu by legal proof², but it may be sufficient to justify detention for reasons specified.

(1) In Entry 9 of List I "Defence, Foreign Affairs or the security of India" or

(2) In Entry 3 of List III "Reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community". The object is not punitive but preventive³. It is meant not merely to prevent a person from acting in a particular way but also from achieving a particular object⁴.

The Law of Preventive Detention can be challenged only in the following ways

(1) If the law comes within the legislative ambit of Lists (Entry 9, List I, Entry 3 List III) in other words if there is legislative competency

1 *Gobalan v State of Madras* (1950) 2 M.L.J. 285 (Das J.)

2 *Vide Lakeridge v Anderson* L.R. (1942) A.C. 206 (218)

3 *State of Bombay v Atma Ram* (1951) 1

M.L.J. 389 (1951) S.C.J. 208 (212)

4 *Gobalan v State of Madras* (1950) S.C.J. 174 (192) (1950) 2 M.L.J. 42 (S.C.), (Kania, C.J.)

(2) If the law satisfied the requirements of Article 22 (1) to (7) and provides the listed safeguards provided in the Article

Preventive detention can only be with reference to future acts and not past events. Thus having been once a member of an *unlawful* association is no ground for detention *in praesenti*¹. If there is legislative competency and the listed safeguards are provided, Courts have nothing to do with the reasonableness or otherwise of the legislation. There is no question of arbitrariness in such legislation². It is just possible the authority exercising the power may abuse that power but the remedy lies through an over vigilant Legislature and not a Court of Law³.

In England by reason of historical circumstances, preventive detention has in a way come to stay during war emergencies only. Dicey's old concept of personal liberty that it can be endangered only by an offence followed by a trial and punishment for the same according to the law of the land, has given ground to the principles envisaged in *R v Halliday*⁴ and *Liversidge v Anderson*⁵, already adverted to. Parliament was thus enabled to make regulations for detention without trial in the 'interests of the public safety or of the defence of the realm'. But the Parliament of England never resorted to this after a war emergency was over. Even the Emergency Power Act, 1920, made no provision for preventive detention in the interests of public order, general safety or essentials of life. This is not so in our Constitution where detention could be had even in times of peace, for reasons of external or internal security, public order, etc. (*Vide* Entry 5 of List III and Entry 9 of List I). This is indeed a great arbitrary power constitutionally approved and it is therefore greatly incumbent on the Courts in every case that comes before them to see if there is legislative competency and the procedural safeguards had been scrupulously followed. It appears to us that while there may be justification for preventive detention for reasons of defence, foreign affairs and security of India (List I, Entry 9) there appears to be no special need for the categories set out in Entry 3 of List III, maintenance of public order or maintenance of supply and services essential to the community, etc. In line with the English Law we may restrict it upto security of the State. The difference will be that while in England this can be resorted to only in grave war emergencies, in India we have it for peace time also. But even that does not matter taking into consideration that we are yet an infant republic and our State should get stabilised and also have good foreign relations and towards this end we may have preventive detention for 'security of the State', 'defence' and 'foreign affairs'. But to go beyond this and introduce constitutional sanctity for preventive detention for purposes of maintenance of public order, maintenance of supply and services essential to the community is to that extent putting the individual liberty of persons in great jeopardy. We may call it constitutional and executive 'nervousness' which no civilized State has hitherto exhibited, in the rest of the world. The ordinary laws are more than enough for the categories set out in List 3, Entry III. It is even better to leave it to the Centre to have a uniform law under List I, Entry 9, than to allow the various State legislatures to have their dig at individual liberty under the concurrent powers

1 *Emperor v Gananath* A I R 1945 Bom. 553 CWN 543. *Vide also Lakshminarayan v Province of Bihar*, (1950) S C J 32 1949 F C R. S C J 32 (1949) F C R 693 (1950) 1 M L J 693 (1950) 1 M L J 760 (F C) 4 I R (1917) A C 260
 2 *Sushil v Government of Bengal*, (1949) 53-5- L R (1942) A C 266.

given in List III Provincial and State politics generally are at a lower standard and it is dangerous to entrust such power to them to be utilized. Very often this is a powerful weapon to curb political opponents of rival parties. As it is Indian political parties at any rate at State level have not exhibited any robust outlook and have yet to be manned by the robust and better sections of society. At the Federal level we appear to be more safe and the objectives are clearer. It is but therefore proper to develop conditions in the country to scrap the entire law of preventive detention during peace time, at any rate we can easily scrap as a first instalment items enumerated in the concurrent list above referred to. 'The heavens will not fall' if this is taken off and individuals and political parties will thereby be free from the 'Damocles Sword' of constitutional oppression. The freedom thus enjoyed will certainly usher in better standards of public and civic life instead of being abused. The normal Indian is always most law abiding and loyal. The guarantee of individual freedom in Articles 21-22 will also be then real and not get eclipsed as it is to day with constitutional safeguards as preventive detention. The critic of the Indian Constitution had been vociferous that our charter of freedom is only a charter of thralldom in the sense that what is guaranteed in one clause is taken away or fettered by the very next clause in our Constitution. This kind of criticism is no doubt absurd but there appears some grounds even for such criticism. Why not we remove the grossly fettering law—such as the Law of Preventive Detention. As we already stated this law may be abrogated in gradual stages in parts, first with the abolition of Entry 3 in List III and finally of Entry 9 of List I. Let our public give the directive to the Legislators on this count and may they soon utilize the legislative machinery towards this end.

Preventive Detention under Articles 21 and 22

We shall now see how the Law of Preventive Detention had been in a way codified by Articles 21 and 22. They may be catalogued thus:

(1) (a) Article 21 provides that preventive detention can only be ordered under authority of law and in conformity with procedure laid down therein.

(b) The law must be valid law within the legislative competence of the enacting body.

(2) Article 22 postulates:

(a) The detenu should be soon informed of the grounds of arrest, he should be given the right to consult and be defended by counsel.

(b) The detenu should be produced before the nearest Magistrate within 24 hours of his arrest after which period he cannot be detained except by authority of a Magistrate.

(c) But (a) and (b) will not apply if the detenu is an enemy alien or to any detenu who is arrested and detained under any law providing for preventive detention.

(d) The law providing for preventive detention should not authorise detention for more than three months. But this may be extended on the Advisory Board's opinion and report as to the sufficiency of the cause.

(i) The Advisory Board shall be constituted and consist of persons of the status of a High Court Judge or qualified to be such.

(ii) The reference to this Board and report by them in the case of each detenu should be within the three months after arrest of the concerned detenu

(iii) The maximum period of detention may be prescribed by law by Parliament in certain stated special circumstances and classes of cases where it may exceed the three month limit for consultation with the Advisory Board. Parliament may also prescribe the maximum period for any class or classes of cases of detention under any law for preventive detention

(c) The detenu should be given an opportunity to show cause against the order and grounds of detention. The grounds should be disclosed except such facts which the 'authority making the order' considers to be against the public interest to disclose

(f) Parliament may prescribe by law the procedure to be followed by an Advisory Board

Any law made under Article 21 cannot override the limitations set out in Article 22. As laid down in *A. K. Gopalan's Case*¹, the extent to which the procedure is prescribed by Article 22 the same is to be observed. Otherwise Article 21 will apply.

If the Legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III of Article 22 (4) to (7) the preventive detention must be prescribed under the Act.² It may be more aptly stated 'Article 22 prescribed the minimum procedure that must be included in any law permitting preventive detention as and when such requirements are not observed the detention, even if valid *ab initio* ceases to be in accordance with procedure established in law'.³ In short, Article 22 lays down the permissible limits of legislation empowering preventive detention. 'Article 21 is applicable to preventive detention except in so far as the provision of Article 22 (4) to (7) either expressly or by necessary implication exclude its application with the result that a person cannot be deprived of his personal liberty even for preventive purposes 'except according to procedure established by law'. Part of such procedure is provided by the Constitution itself in clauses (5) and (6) of Article 22. If the procedure is not complied with, detention may be held to be unlawful as it would then be deprivation of personal liberty which is not in accordance with procedure established by law.'

We may restate that Articles 21 and 22 are independent of the provision in Article 19. In *Ram Singh v. State of Delhi*⁴, it was posited that "even though a restriction upon the freedom of expression may be invalid owing to the fact that it is not covered by Article 19 (2) the same ground may justify preventive detention, for Article 22 is not limited by any such consideration. But after the inclusion of the word 'public order' in Article 19 (2) by the Constitution Amendment Act, 1951, the field for difference appears to have been narrowed altogether."

Safeguards in Article 22

Article 22 contains two parts. (a) The first part is contained in Clauses (1) and (2) which lay the limitations upon the Union and State legislature in enacting any procedural law for deprivation of personal liberty (*Vide* Entry 2 of List III read with Article 21). This is the ordinary law to which the limitations fixed

¹ (1950) S.C.J. 174 (188-9) (1950) 2 M.L.J. 501 (S.C.) (per Kania C.J.)
² *State of Bombay v. Atma Ram*, (1951) 3 (1951) S.C.J. 374 (376) (Sastri, J.)

S.C.J. 208 (211) (1951) 1 M.L.J. 389 (S.C.)
 (Sastri, J.)

are (i) that the arrested person must be informed of the grounds of his arrest as soon as may be (ii) Production of the arrested person within 24 hours of his arrest to the nearest Magistrate (iii) The arrested person should be given the opportunity to consult a legal practitioner and to defend himself. It may be noted production within 24 hours to the Magistrate is not available to a case of a detenu arising under clauses (4) to (6) of Article 22

(b) The second part is contained in clauses (4) to (6) of Article 22 and covers the special law of preventive detention as such in contradistinction to the ordinary law set out above. These cover the limitations on the Union and State legislatures to make any law of preventive detention, without trial (*Vide* Entries 9 of List I and 3 of List III Schedule VII). The limitation to prevent 'arbitrary arrests' by the executive under cover of such 'preventive laws' are set forth hereunder

(i) The ordinary period of detention without trial cannot exceed three months. But Parliament may enact a law laying down in what cases the three months' limit may be exceeded (Article 22, clause (7) (a))

(ii) Also the three months' limit may be exceeded in the report of detention to enable him to make a representation against such order of detention (Article 22, clause (5))

(iii) The detenu must be furnished as soon as may be the grounds of detention to enable him to make a representation against such order of detention (Article 22, clause (5))

(iv) But the authority need not disclose facts which will be against public interest to disclose (Article 22, clause (6))

(v) The protection of Article 22, clauses (1) and (2) is not available to an enemy alien or any person detained under any law of preventive detention

Latest Discussion in Parliament

It is apposite to record here the latest views expressed in Parliament in December, 1954, when the Government sought leave of the Parliament to continue the working of the Preventive Detention Act till its normal course, viz., 31st December, 1954

The Home Minister, Dr. Kailas Nath Katju, reported to the House of the People that he had come to the conclusion that there was "more than ample justification for letting the Preventive Detention Act run its course till December 31, 1954"

All State Governments, he said, had strongly urged that in existing conditions it was imperative that the powers conferred by the Act should continue to be available to them, and that the Act should not be allowed to lapse prematurely

Dr. Katju made the report in accordance with his undertaking to the House that he would ascertain whether or not the exercise of these powers could be discontinued even before the expiry of the prescribed term of life of the Act

Dr. Katju's report covers the period September 30, 1952, to September 30, 1953 and was laid before the House by the Law Minister, Sri C. C. Biswas. It covers 27 foolscap printed pages and gives a variety of details about detenues in each State

Dr. Katju said that "the case becomes overwhelming when there is absolute unanimity among all State Governments on the subject as is the position in the present

instance. From my personal examination of the situation in the country as a whole, I have come to the conclusion that the State Governments are justified in the request that they have made for the continuance of the Act up to the end of 1954. A study of the data contained in the attached tables will establish that in the administration of the Act, the State Governments have acted reasonably, and with fullest possible care and circumspection to preclude the risks of misuse. As a matter of fact the Act itself is so framed that, consistent with the basic need for retaining the power of prevention, the scope for abuse has been reduced to the minimum.

'The Government has the power to order *suo motu*, the release of detenus. The tables indicate that this power has been used liberally. Advisory Boards are so constituted that they can bring an independent judicial mind to bear upon each case, and possess the right to have the detenu or any other person produced before them for direct hearing.

"The right of personal appearance before the Advisory Board has also been conferred on the detenu. At higher levels, there are the High Court and the Supreme Court to scrutinise cases where detention is alleged to have been ordered on insufficient or unjustifiable grounds. Even where statements containing grounds for detention were somewhat loosely and vaguely drawn, the decision has been in favour of detenus. The fact that this system of checks and balance is not illusory is amply established by the attached tables, and if any doubts remain on this point I shall endeavour to resolve them. In all these circumstances, I have come to the conclusion that there is more than ample justification for letting the Act run its course.

"Persons in detention on September 30, 1952 numbered 584. The number of persons detained during the 12 months from September 30, 1952, to September, 1953, with a view to preventing persons from acting in any manner prejudicial to the defence of India, India's relations with foreign powers or the security of India was four.

"The number detained for preventing persons from acting in any manner prejudicial to the security of the State or the maintenance of public order was 931. The number detained for preventing persons from acting in a manner prejudicial to the maintenance of supplies and services essential to the community was 29."

As typical of the Opposition's view can be recorded here, Acharya Kripalani's

Acharya Kripalani said that it was unfortunate that those who called of justice and human rights were forgetting those principles when they came to power. The reasons given by the alien Government for similar acts during the freedom movement were the same as those advanced by the Home Minister. One reason given was that ideas which were sacred before the liberation had now become outmoded and there was no use for them. Another reason was that those who held power to-day were the representatives of the people.

"To say that the representatives of the people cannot be tyrants is a fallacy which is not borne out by history. History shows that democracy can be totalitarian, it can crush people as effectively as any king or Emperor," he said.

Acharya Kripalani said that while the Act might be in consonance with the letter of the law it had violated the spirit of the law.

"Again what was meant by the security of India? Could it be disturbed by small riot here or there? Could there be any State in the country which was insecure when the country was secure?"

"The term 'public order' was a vague term which had been used by the English and could be used against anybody

"If the Congress Government were not in power to day the provisions of the Act relating to 'relations between India and foreign powers' could have been used against the highest functionaries of the Congress over the agitation they had started against the proposed military pact between the United States and Pakistan.

"The Minister had referred to goondas and maintenance of essential supplies and services. These were subjects which could be dealt with under the Indian Penal Code. There was no need to requisition the powers under the Act but for the Government's own shortcomings and inefficiency. Eight years had passed since the end of the war and in no other democratic country were such powers in force.

Dr Karyu, Acharya Kripalani continued, had "jibed at the judiciary" and said that even if there was the smallest flaw they decided in favour of the detenu and released him.

Mr Kripalani quoted the opinions expressed in several detention cases by the High Courts of Bombay and Rajasthan and the Supreme Court on the inadequacy of particulars supplied by the 'competent authorities' who were old District Magistrates and other officials brought up under the British Government in an atmosphere not conducive to democracy.

Conclusion

We may conclude that while it may be desirable to keep on the statute-book a law such as preventive detention till a time when democracy in India had taken a settled root allowing only changes by constitutional means and not by public disorders, it is nevertheless urgently desirable that the law of preventive detention should be confined only to safeguard defence, foreign affairs and security of India. So we shall strive to abrogate the provision relating to maintenance of public order or the maintenance of supplies and services essential to the community. We must tend to be preventive and not punitive. The ordinary law of the land must be made sufficient to safeguard these latter matters outlined in Entry 3 of List III, Schedule VII of the Indian Constitution. We have dealt above only with the salient constitutional features under Article 22 of the Indian Constitution as the same features of The Law of Preventive Detention are carried out in The Preventive Detention Act of 1950 as amended in 1951.¹

¹ Vide for full commentary in The Author's *Detention* (to be soon published by the M L J office) forthcoming book on the *Law of Preventive*

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —B K MUKHERJEA, VIVIAN BOSE AND T L VENKATARAMA
 AYYAR, JJ

Rattan Anmol Singh and Ram Prakash

*Appellants **

Ch Atma Ram and others

Respondents

Representation of the People Act (XLIII of 1953) sections 33 and 36—Scope—Nomination papers bearing only thumb marks of illiterate proposer and seconder—If subscribed

Where the proposer and seconder being illiterate placed their thumb marks in the nomination paper but the thumb marks were not attested

Held Without attestation the nomination paper cannot be said to be subscribed by a proposer and seconder as required by the Rules and the Returning Officer is bound to reject the nomination papers

The signing whenever a signature is necessary must be in strict accordance with the requirements of the Act and where a signature cannot be written it must be authorised in the manner prescribed by the Rules

The attestation is not a mere technical or unsubstantial requirement and the defect cannot be set right at the scrutiny under section 36 (4)

The attestation and satisfaction of the Returning Officer as to identity of the persons must exist at the presentation stage and a total omission of such an essential feature cannot be subsequently validated any more than the omission of a candidate to sign at all could have been

Appeals by Special Leave granted by this Court on the 11th November 1953, against the Judgment and Order dated the 24th June, 1953, of the Election Tribunal, Ludhiana, in Election Petition No 153 of 1952

C K Daphtry, Solicitor General for India (*Harbans Singh Doabia and Rajinder Narain* Advocates, with him) for Appellant in Civil Appeal No 213 A

Tilak Raj Bhasin and Harbans Singh, Advocates for Respondent No 2 in Civil Appeal No 213 A and Appellants in Civil Appeal No 213 B

Naunil Lal, Advocate for Respondents Nos 3 and 19 (in both Appeals)

The Judgment of the Court was delivered by

Bose J.—These are two appeals against the decision of the Election Tribunal at Ludhiana

The contest was for two seats in the Punjab Legislative Assembly. The constituency is a double member constituency, one seat being general and the other reserved for a scheduled caste. The first respondent is Atma Ram. He was a candidate for the reserved seat but his nomination was rejected by the Returning Officer at the scrutiny stage and so he was unable to contest the election. The successful candidates were Rattan Anmol Singh, the appellant in Civil Appeal No 213-A of 1953 for the general seat and Ram Prakash, the appellant in Civil Appeal No 213 B of 1953, for the reserved. Atma Ram filed the present election petition. The Election Tribunal decided in his favour by a majority of two to one and declared the whole election void. Rattan Anmol Singh and Ram Prakash appeal here.

The main question we have to decide is whether the Returning Officer was right in rejecting the petitioner's nomination papers. The facts which led him to do so are as follows. The Rules require that each nomination paper should be "subscribed" by a proposer and a seconder. The petitioner put in four papers. In

* Civil Appeals Nos 213 A and 213 B of 1953

plus something else, namely a particular assent, the element of "signing" has to be present the Schedule places that beyond doubt because it requires certain "signatures" We are consequently of opinion that the "signing", whenever a "signature" is necessary must be in strict accordance with the requirements of the Act and that where the signature cannot be written it must be authorised in the manner prescribed by the Rules Whether this attaches exaggerated importance to the authentication is not for us to decide What is beyond dispute is that this is regarded as a matter of special moment and that special provision has been made to meet such cases We are therefore bound to give full effect to this policy

Now if subscribe can mean both signing, properly so called, and the placing of a mark and it is clear that the word can be used in both senses), then we feel that we must give effect to the general policy of the Act by drawing the same distinction between signing and the making of a mark as the Act itself does in the definition of 'sign' It is true the word 'subscribe' is not defined but it is equally clear, when the Act is read as a whole along with the form in the second Schedule that "subscribe" can only be used in the sense of making a signature and as the Act tells us quite clearly how the different types of "signature" are to be made, we are bound to give effect to it In the case of a person who is unable to write his name his "signature" must be authenticated in such manner as may be prescribed The prescribed manner is to be found in Rule 2 (2) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 It runs as follows

If it be proved to the satisfaction of the Returning Officer that a person who is unable to write his name shall, unless he has placed a mark on such instrument or other paper in the presence of the Returning Officer or the presiding officer or such other officer as may be specified in this behalf by the Election Commission and such officer on being satisfied as to his identity has attested the mark as being the mark of such person

In view of this we are clear that attestation in the prescribed manner is required in the case of proposers and seconders who are not able to write their names

The four nomination papers we are concerned with were not "signed" by the proposers and seconders in the usual way by writing their names, and as their marks are not attested it is evident that they have not been "signed" in the special way which the Act requires in such cases If they are not "signed" either in one way or the other, then it is clear that they have not been "subscribed" because "subscribing" imports a "signature" and as the Act sets out the only kinds of "signatures" which it will recognise as "signing" for the purposes of the Act, we are left with the position that there are no valid signatures of either a proposer or a seconder in any one of the four nomination papers The Returning Officer was therefore bound to reject them under section 36 (2) (d) of the Act because there was a failure to comply with section 33, unless he could and should have had resort to section 36 (4)

That sub section is as follows

"The Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character

The question therefore is whether attestation is a mere technical or unsubstantial requirement We are not able to regard it in that light When the law enjoins the observance of a particular formality it cannot be disregarded and the substance of the thing must be there The substance of the matter here is the

satisfaction of the Returning Officer at a particular moment of time about the identity of the person making a mark in place of writing a signature. If the Returning Officer had omitted the attestation because of some slip on his part and it could be proved that he was satisfied at the proper time, the matter might be different because the element of his satisfaction at the proper time, which is of the substance, would be there, and the omission formally to record the satisfaction could probably, in a case like that, be regarded as an unsubstantial technicality. But we find it impossible to say that when the law requires the satisfaction of a particular officer at a particular time his satisfaction can be dispensed with altogether. In our opinion, this provision is as necessary and as substantial as attestation in the cases of a will or a mortgage and is on the same footing as the "subscribing" required in the case of the candidate himself. If there is no signature and no mark the form would have to be rejected and their absence could not be dismissed as technical and unsubstantial. The "satisfaction" of the Returning Officer which the Rules require is not, in our opinion, any the less important and imperative.

The next question is whether the attestation can be compelled by the persons concerned at the scrutiny stage. It must be accepted that no attempt was made at the presentation stage to satisfy the Returning Officer about the identity of these persons but evidence was led to show that this was attempted at the scrutiny stage. The Returning Officer denies this, but even if the identities could have been proved to his satisfaction at that stage it would have been too late because the attestation and the satisfaction must exist at the presentation stage and a total omission of such an essential feature cannot be subsequently validated any more than the omission of a candidate to sign at all could have been. Section 36 is mandatory and enjoins the Returning Officer to refuse any nomination where there has been

any failure to comply with any of the provisions of section 33.

The only jurisdiction the Returning Officer has at the scrutiny stage is to see whether the nominations are in order and to hear and decide objections. He cannot at that stage remedy essential defects or permit them to be remedied. It is true he is not to reject any nomination paper on the ground of any technical defect which is not of a substantial character but he cannot remedy the defect. He must leave it as it is. If it is technical and unsubstantial it will not matter. If it is not, it cannot be set right.

We agree with the Chairman of the Election Tribunal that the Returning Officer rightly rejected these nomination papers. The appeals are allowed with costs and the order of the Election Tribunal declaring the elections of the two successful candidates to be wholly void is set aside. The election petition is dismissed, also with costs.

Appeals allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction]

PRESENT —S R DAS, GHULAM HASAN AND B JAGANNADHADAS, JJ.

Moran Mar Bassehos Catholicos and another

Appellants.*

The Most Rev Mar Poulose Athanasius and others

Respondents

United State of Travancore and Cochin High Court Act (V of 1125), sections 8 and 25—Applicability to review application pending in Travancore High Court on 1st July, 1949

Civil Procedure Code (V of 1908), Order 47, rule 1—Scope—Grounds for review

Where there was an application for review properly instituted and was pending in the Travancore High Court on the 1st July, 1949 it has to be continued under section 8 of Ordinance (II of 1124) in the High Court of the United State of Travancore-Cochin as if it had commenced in the said High Court after the coming into force of the said Ordinance. Where the application is rejected and the Supreme Court admits the review on appeal the position would be the same, for upon such admission the appeal filed in the Travancore High Court and continued in the High Court of the United State by virtue of section 8 of Ordinance (II of 1124), the appeal so revived, will under section 8 of Act (V of 1125) have to be continued in that High Court as if it had commenced in that High Court after the coming into force of that Act. Under our present Constitution Travancore Cochin has become a Part B State and under Article 214 of the Constitution, the High Court of the United State of Travancore Cochin has become the High Court of the Part B State of Travancore Cochin and shall have the jurisdiction to exercise all the jurisdiction of and administer the law administered by the High Court of the United State. Such appeal must be disposed of under section 25 of Act (V of 1125). That section does not require any confirmation of the judgment passed on the re-hearing of the appeal by the Maharaja or Rajapramukh or any other authority. Assuming, however, that the appeal if restored will have to be governed by section 12 of the Travancore High Court Regulation (IV of 1099) even then the provisions of section 11 would have to be applied "as far as may be" and it may well be suggested that the portion of section 11 which requires confirmation by the Maharaja will in the events that have happened, be inapplicable. The review application cannot therefore be said to have become infructuous.

The scope of an application for review is much more restricted than that of an appeal.

The Court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in the provisions in the Civil Procedure Code. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason, (i.e. a reason sufficient on grounds at least analogous to those specified in the rule).

When the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it it will not generally appear on the record but will have to be brought before the Court by way of affidavit and this can only be done by way of review. It is permissible to rely on the affidavit as an additional ground for review of the judgment.

On appeal by special leave granted by this Court on the 14th April, 1952, from the Judgment, dated the 21st December, 1951, of the High Court of Judicature of Travancore-Cochin arising out of the Judgment and Decree, dated the 18th January, 1943, of the Court of District Judge, Kottayam.

N. P. Engineer, Senior Advocate (P. N. Bhagwati, M. Abraham and M. S. K. Sastry, Advocates, with him) for Appellants

M. C. Setalvad, Attorney General for India, C. K. Daphtary, Solicitor-General for India and A. P. Abraham, Senior Advocate, (T. R. Balakrishna Ayyar and M. R. Krishna Pillai, Advocates, with them) for Respondent No. 2.

The Judgment of the Court was delivered by

Das, J—This appeal by Special Leave arises out of a suit filed in the District Court of Kottayam as far back as in 1938. That suit was concerned with the disputes that had arisen between two rival sections of the Malankara Jacobite Syrian Christian community regarding the fundamental tenets of their church and the possession and administration of the church properties. In order to fully appreciate the rival contentions carefully formulated and elaborately argued by learned advocates for both parties appearing before us, it is necessary to know the genesis of the controversy between the parties which has behind it a fairly long history and which must, accordingly, be stated at the very outset.

In Malabar there is a Christian community commonly known as the Malankara Jacobite Syrian Christians. That community traces its origin to 52 A.D. when St. Thomas, one of the disciples of Jesus Christ came to Malabar and established the church there. In 1599 A.D. under the influence of the Portuguese political power on the West Coast of India the community accepted the Roman Catholic faith. This affiliation, however, did not last long. At a meeting known as Mattancheri meeting held in 1654 the Roman Catholic supremacy was thrown off and the Church in Malabar came under the authority of the Patriarch of Antioch who began to depute Metropolitans (Bishops) from Persia and Syria for ordaining Metropolitans in Malabar. This continued up to 1800 A.D. Between 1800 A.D. and 1842 A.D. the local Metropolitan ordained his successor. The last of the Metropolitans so ordained was Mar Cheppat Dionysius. In 1840 one Mar Mathew Athanasius went to Syria and got himself ordained as Metropolitan by the then reigning Patriarch of Antioch. This is said to be the first instance of a Metropolitan being ordained by the Patriarch himself.

There were disputes between the Church Mission Society and the Malankara Jacobite Syrian Church over properties held jointly by them. These disputes were settled by what is known as the Cochun Award made in 1840. This award divided the properties between the two bodies and so far as the properties allotted to the Malankara Jacobite Syrian Church were concerned it provided that they should be administered by three Trustees, namely, (i) the Malankara Metropolitan, (ii) a Kathanar (i.e., priestly) trustee and (iii) a lay trustee.

In 1842 Mar Mathew Athanasius returned to India but Mar Cheppat Dionysius refused to hand over charge to the former. In 1846 the Patriarch of Antioch sent one Mar Kurilos to settle the dispute. Mar Kurilos adopted a novel way of settling the disputes. He excommunicated Mar Mathew Athanasius and appointed himself as the Metropolitan of Malankara. This he is said to have done by utilising certain blank papers containing the signatures of the Patriarch. Mar Cheppat Dionysius withdrew in favour of Mar Kurilos but Mar Mathew Athanasius persisted in his claim. In 1848 the Travancore Government set up what was called the Quilon Committee to settle the dispute. That Committee decided in favour of Mar Mathew Athanasius who, therefore, took over charge as Malankara Metropolitan. It appears that later on Mar Mathew Athanasius incurred the displeasure of the Patriarch who in 1865 excommunicated Mar Mathew Athanasius and ordained one Mar Joseph Dionysius, who had gone to Syria, as Metropolitan. On the return of Mar Joseph Dionysius, however, Mar Mathew Athanasius refused to hand over charge to the former but continued in possession of his office and the church properties.

In 1876 Patriarch Peter III came to Malabar. He called a meeting of the accredited representatives of all the churches in Malabar which accepted the ecclesiastical supremacy of the Patriarch of Antioch. The said representatives met together in a Synod called the Mulamthuruthu Synod under the presidentship of Patriarch Peter III. At that Synod the Malankara Syrian Christian Association, popularly called the Malankara Association, was formed to manage all the affairs of the churches and the community. It consisted of the Malankara Metropolitan as the *ex officio* President and three representatives from each church. A Managing Committee of 24 was to be the standing working committee of the said Malankara Association. During his stay in Malabar Peter III ordained 6 Metropolitans.

In the same year Mar Mathew Athanasius died after having ordained his brother Mar Thomas Athanasius as his successor and accordingly the latter took possession of the church properties and began to act as the Malankara Metropolitan.

On the 4th March, 1879, Mar Joseph Dionysius claiming to be the proper person consecrated and appointed Metropolitan of the Jacobite Syrian Church and the President of the Malankara Association filed a suit (O S No 439 of 1854) in the Zilla Court of Alleppey against Mar Thomas Athanasius and two other persons for the recovery of the church properties, movable and immovable, and other incidental reliefs. The most important point in dispute related to the authority of the Patriarch of Antioch over the Malankara Edavagai, i.e. the Syrian Christian Diocese of Travancore. Mar Joseph Dionysius asserted that the supremacy of the Patriarch consisted in his consecrating and appointing Metropolitans from time to time to govern and rule over the said Edavagai, sending Morone (the sanctified oil) for baptismal purposes, receiving Ressissa from the community to maintain his dignity and generally in controlling the ecclesiastical and temporal affairs of the Edavagai. Mar Thomas Athanasius' contention amounted to a total denial of such alleged supremacy of the Patriarch. According to him the Patriarch could not claim, as a matter of right, to have any control over the Syrian Church in Malabar, either in temporal or spiritual matters and that as a high dignitary in the churches of the country where their Saviour was born and crucified the Malabar Syrian Christian community did venerate the Patriarch but that such veneration did not create any right in him to take the position that was claimed for him by Mar Joseph Dionysius.

After various proceedings to which it is not necessary to refer, the Travancore Royal Court of Final Appeal pronounced its judgment (Exhibit DY) in 1879 and by a majority of 2 to 1 dismissed the appeal of the defendant Mar Thomas Athanasius and confirmed the decree of the lower Courts in favour of the Respondent Mar Joseph Dionysius. The paragraph 347 of the majority judgment summarised the conclusions as follows —

'347 The conclusions we have arrived at on the whole are that the Respondent's claim is not barred by limitation; that the Ecclesiastical Supremacy of the See of Antioch over the Syrian Church in Travancore has been all along recognised and acknowledged by the Jacobite Syrian Community and their Metropolitans, that the exercise of the supreme power consisted in ordaining, either directly or by duly authorised Delegates, Metropolitans from time to time to manage the spiritual matters of the local church in sending Morone (Holy Oil) to be used in the churches in this country for baptismal and other purposes and in general supervision over the spiritual government of the Church, that the authority of the Patriarch has never extended to the government of the temporalities of the Church which, in this respect, has been an independent Church, that the Metropolitan of the Syrian Jacobite Church in Travancore should be a native of Malabar consecrated by the Patriarch

of Antioch, or by his duly authorised Delegates and accepted by the people as their Metropolitan to entitle him to the spiritual and temporal government of the local Church that the Respondent had been so consecrated and accepted by the majority of the people and consequently had a perfect right to succeed to the Metropolitanship on the death of Mar Athanasius that the Appellant had neither been properly consecrated nor accepted by the majority thereof and therefore had no title to the Dignity and Office of Metropolitan that the Appellant's possession of the properties of the Church and its appurtenances and the assumption of the office of Metropolitan have been wrongful since the death of Mar Athanasius, the admitted last Metropolitan and Trustee, that the Appellant should therefore surrender the insignia and office of Metropolitan of the Malankara Syrian Jacobite Church and give up possession of all the properties and moneys appertaining thereto which he now holds to the Respondent who would assume and take possession of the properties, etc., to be administered with two other Trustees as required by the Endowment Deed (Exhibit III), that the Respondent's suit against the second Defendant second Appellant having no cause of action should be dismissed, that the mortgage in favour of 3rd Appellant (7th Defendant) is null and void and should be cancelled, that the clerical errors in the Decrees of the lower Courts above noted should be rectified.

As a result of the aforesaid judgment (Exhibit DY) Mar Joseph Dionysius came into possession of the office of the Malankara Metropolitan and of the church properties.

Patriarch Peter III did not, naturally enough, approve of that judgment and in 1892 issued a Kalpana or message (Exhibit 172 (b)) addressed to the 24 members of the Synod appointed at Mulamthuruthu (presumably referring to the Managing Committee of the Malankara Association) ordering that thenceforth Mar Joseph Dionysius had no authority to decide any matter in Synod and enter into any common affair of the Dioceses except Cochin or Quilon and authorising the 24 members to elect one of the Kasisas (Priests) as the President. It is not quite clear whether any effective action was taken on this Kalpana.

In 1905 Abdul Messiah was the Patriarch of Antioch. The Sultan of Turkey withdrew the *firman* he had issued in favour of Abdul Messiah and issued a fresh *Firman* in favour of one Abdulla II. It was a matter of dispute whether there was a valid Synodical removal of Abdul Messiah from the office of Patriarch.

In 1907 one Mar Geeverghese Dionysius, whose name figures very prominently in the present proceedings, went to Syria and got himself ordained as a Metropolitan. In 1909 Mar Joseph Dionysius died. The Malankara Association elected and installed Mar Geeverghese Dionysius as the Malankara Metropolitan and as such he became the *ex-officio* President of the Malankara Association and one of the trustees of the church properties. The other two co-trustees of Mar Joseph Dionysius, namely Kora Mathan Malphan and C J Kurean, continued as Co-trustees of Mar Geeverghese Dionysius.

In 1909 Abdulla II came to Malabar. He convened a meeting of the Malankara Association at the old Seminary of Kottayam and demanded that the said Association should accept and acknowledge the temporal authority of the Patriarch. The congregation, it is said, declined to comply with such demand and the meeting ended in confusion. Abdulla II thereafter visited the parish churches separately and attempted to get Udampadis (submission deeds) acknowledging spiritual and temporal supremacy of the Patriarch and actually succeeded in getting them from some of the churches. Abdulla II started ordaining new Metropolitans who gave Udampadis to him. He excommunicated those who declined to do so and by issuing Kalpanas he enjoined the faithful not to have anything to do with them. In 1910 Mar Poulouse Athanasius (the first plaintiff and now the first respondent) gave an Udampadi and he was ordained as a Metropolitan.

Mar Geeverghese Dionysius, however, declined to submit and give any Udampadi. Accordingly in 1911 Abdulla II excommunicated Mar Geeverghese Dionysius whom he himself had ordained in 1907 and ordained Mar Kurilos as the Metropolitan of Malankara so as to make the latter automatically the *ex-officio* President of the Association and trustee of the Church properties. The other two trustees Kora Mathan Malpan and C.J. Kurean sided with Abdulla II and his new nominee Mar Kurilos. Mar Geeverghese Dionysius thereupon convened a meeting of the Malankara Association. That meeting declared the excommunication of Mar Geeverghese Dionysius invalid and removed Kora Mathan Malpan and C.J. Kurean from trusteeship and appointed two new trustees, namely, Mani Poulouse Kathanar (the present second appellant) and one Kora Kochu Korula (since deceased). The said meeting also resolved to enquire into the real position of Abdulla II and Abdul Messiah and suspend the payment of Ressissa to the Patriarch. Upon this Abdulla II in 1912 issued a Kalpana (Exhibit 9) enjoining that his supporters 'should entirely keep aloof from these wolves (meaning Abdul Messiah and Mar Geeverghese Dionysius) and that you should not accept them in any way'.

At this stage, in 1912 Abdul Messiah, whose Firman had been withdrawn by the Sultan of Turkey, came to Malabar. He declared the excommunication of Mar Geeverghese Dionysius by Abdulla II as invalid. In 1913 he issued a Kalpana (Exhibit 80) establishing the Catholicate in Malabar as it appeared to him that "unless we do instal a Catholicos, Our Church, owing to various causes, is not likely to stand firm in purity and holiness". By this Kalpana Abdul Messiah ordained Mar Poulouse Basselios as the first Catholicos and also ordained three Metropolitans. This Kalpana further provided thus:

The Catholicos aided by the Metropolitans will ordain melpattakkars in accordance with the Canons of Our Holy Fathers and consecrate Holy Morone. In your Metropolitans is vested the sanction and authority to instal a Catholicos, when a Catholicos dies. No one can resist you in the exercise of this right.

Shortly after this Abdul Messiah left Malabar. The position at that time was that there were two rival groups in the Church who were represented by two rival sets of trustees, namely, (1) Mar Geeverghese Dionysius, and his co trustees Mani Poulouse Kathanar (the second appellant) and Kora Kochu Korula (since deceased) and (2) Mar Kurilos and Kora Mathan Malpan and C.J. Kurean, who had sided with Mar Kurilos.

In 1915 both Abdulla II and Abdul Messiah died and in 1917 Elias became the Patriarch of Antioch. Mar Geeverghese Dionysius and his group contended that Elias had not been duly installed as no notice had been given to the Malankara Metropolitans. On the death of the first Catholicos Mar Poulouse Basselios, Mar Geeverghese Philixinos was installed as the second Catholicos and in 1929, on the death of the latter, the present appellant Moran Mar Basselios was installed as the third Catholicos. Both these installations were made by the local Metropolitans in terms of the procedure prescribed by the Kalpana (Exhibit 80) issued by Abdul Messiah.

In the meantime in 1913 the Secretary of State for India filed an interpleader suit (No. 94 of 1088) in the District Court of Trivandrum against (1) Mar Geeverghese Dionysius, (2) Mani Poulouse Kathanar, (3) Kora Kochu Kurula, (4) Mar Kurilos, (5) Kora Mathan Malpan and (6) C.J. Kurean for the determination of the question as to which of the two rival sets of trustees were entitled to draw

the interest on the amounts standing to the credit of the Malankara Jacobite Christian community in the British Treasury. The two rival sets of trustees filed written statements interpleading against each other. The suit was converted into a representative suit and defendants 7 to 41 got themselves impleaded in the suit as defendants and supported defendants 1 to 3. During the pendency of the suit Mar Kurilos died and Mar Poulouse Athanasius (the present first Respondent) who claimed to be the successor of Mar Kurilos as Malankara Metropolitan was added as defendant No. 42.

Thirty three issues were struck in that suit but it is not necessary for our present purpose to recount all the findings of the trial Court on all those issues. Suffice it to say that the District Judge found and held amongst other things—

(i) That Mar Geeverghese Dionysius was the lawful Malankara Metropolitan and was recognised and accepted as such by the Malankara Syrian Church and as such had become a trustee of the Church properties (Issue I)

(ii) that the Patriarch had only a power of general supervision over the spiritual government of the Church but had no right to interfere with the internal administration of the Church in spiritual matters which rested only in the Metropolitan and that Patriarch has no authority jurisdiction control, supervision or concern over or with the temporalities of Arch Diocese of Malankara (Issue III),

(iii) that Patriarch Abdulla II did make an attempt to secure authority over the temporalities of the Syrian Church when he visited Travancore in 1085 but that his attempts and pretensions in regard to the government of the temporalities of the Church were illegal and against the interest and well being of the Malankara Church and the community (Issues V and VI)

(iv) that Mar Geeverghese Dionysius was excommunicated by Patriarch Abdulla II but such excommunication was opposed to the constitution of the Malankara Church as laid down by the Synod of Mulamthuruthu and was canonically invalid and was still recognised and accepted as the Malankara Metropolitan by a large majority of Malankara Christian community (Issues VII to XVII)

(v) that defendants 2 and 3 (Mani Poulouse Kathanar and Kora Kochu Korula) had been elected by the community as trustees to co-operate with Mar Geeverghese Dionysius (Issue XVIII),

(vi) that 4th Defendant (Mar Kurilos) had not been elected and was not accepted and recognised as the Malankara Metropolitan by the community and was not competent to be a trustee (Issues XIX and XX)

(vii) that defendants 5 and 6 (Kora Mathan Malpan and C J Kurean) had been validly removed from the office of trustee and defendants 2 and 3 (Mani Poulouse Kathanar and Kora Kochu Korula) had been validly appointed in their places (Issues XXI and XXII)

(viii) that defendants 1, 2 and 3 (Mar Geeverghese Dionysius, Mani Poulouse Kathanar and Kora Kochu Korula) did not accept Abdul Messiah or deny the authority of Abdulla II over the spiritual supervision of the Church and they had not by such act become alien to the faith or incompetent to be trustees (Issue XXVII)

(ix) that the 42nd defendant (Mar Poulouse Athanasius the present first Respondent) had not been canonically ordained or validly appointed as Malankara Metropolitan or as President of the Malankara Association (Issues XXX to XXXIII)

(x) that defendants 1, 2 and 3 were entitled to receive payment of the interest in deposit

On these findings the learned District Judge passed a decree in favour of Mar Geeverghese Dionysius (Defendant 1), Mani Poulouse Kathanar (Defendant 2) and Kora Kochu Korula (Defendant 3) as the lawful trustees of the church properties

The defendants 5, 6 and 42 (Kora Mathan Malpan, C J Kurean and Mar Poulouse Athanasius) appealed to the High Court. The principal questions urged in that appeal were —

- (1) What was the canon law binding on the Church and what were the powers of the Patriarch under that law in regard to the excommunication of Metropolitan ,
- (2) was the excommunication of Mar Geeverghese Dionysius by the Patriarch opposed to the canon law and the constitution of the Malankara Syrian Church as laid down by the Synod of Mulamthuruthu ,
- (3) if the Patriarch was by himself competent to excommunicate to Metropolitan, whether any procedure had been prescribed to be followed by the Patriarch before the power of excommunication could be exercised by him
- (4) If no such procedure had been so prescribed whether that power had been exercised in a manner consonant with the principles of natural justice and with no corrupt motive , and
- (5) whether the excommunication of Mar Geeverghese Dionysius was valid

The Full Bench of the Travancore High Court pronounced judgment in 1923 which will be found reported in 41 Tra L R 1 and is marked as Exhibit DZ in the present proceedings. In paragraph 80 at page 74 of the Report the Full Bench held that Exhibit 18 which was produced by the appellants was the correct version of the canon law which was treated and accepted as such by the Malankara Jacobite Syrian Church. The conclusions arrived at by the Full Bench on questions 1, 2 and 3 were summarised in paragraph 124 of their judgment at pages 114-115 as follows

124 Our conclusions on the questions 1, 2 and 3 formulated for decision are —

- (a) that Exhibit 18 and not Exhibit A is the version of the Canon Law that has been recognised and accepted by the Malankara Jacobite Syrian Christian Church as binding on it,
- (b) that under Exhibit 18 the Patriarch of Antioch possess the power of ordaining and excommunicating Bishops and Metropolitan by himself, *ie*, in his own right and that it is not necessary for him to convene a Synod of Bishops and proceed by way of Synodical action, in order to enable him to exercise these powers —the person ordained being, of course a native of Malabar and accepted by the people
- (c) That there is nothing in the Mulamthuruthu Resolutions Exhibit EL, which limits the powers possessed by the Patriarch under the Canon Law, in matters of spiritual character, or which imposes restrictions on him in regard to the exercise of such powers, and
- (d) that no special forms of procedure are prescribed by Exhibit 18 for observance by Patriarch before he exercises his power of excommunication

Then, after an elaborate discussion of the relevant materials, the learned Judges in paragraph 254 at page 212 recorded their findings on questions 4 and 5 in the affirmative and held that in consequence Mar Geeverghese Dionysius had lost his status of Malankara Metropolitan and Metropolitan trustee. In that view of the matter they considered it unnecessary to express any opinion on the question whether Mar Geeverghese Dionysius had become a schismatic or alien to the Jacobite faith by the repudiation of Patriarch Abdulla II and the recognition of Abdul Messiah as Patriarch. They held that although the Malankara Association had the power to remove them the defendants 5 and 6 had not been validly removed inasmuch as the meeting which had removed them was convened and presided over by Mar Geeverghese Dionysius, an excommunicated Metropolitan and that the proceedings of that meeting having been *ab initio* void the defendants 5 and 6 continued to be trustees. In the result the Full Bench reversed the judgment and decree of the District Judge and directed that the money lying deposited in Court be drawn by the defendants 5 and 6 and by the person to be thereafter duly elected, appointed and consecrated as the Malankara Metropolitan.

Mar Geeverghese Dionysius and his co-trustees applied under section 12 of the Travancore High Court Regulation 1099 for review of the aforesaid judgment of the Full Bench. That application was allowed but it was made a condition to the admission of the review that, on the rehearing, the findings recorded, (i) as to the authenticity of Exhibit 18 (the then appellants' version of the Canon Law), (ii) as to the power of the Patriarch to excommunicate without the intervention of the Synod and (iii) as to the absence of an indirect motive on the part of the Patriarch which induced him to exercise his powers of excommunication, must be taken as binding. The appeal was then reheard by a Full Bench on the basis of that order.

After rehearing the appeal the Full Bench pronounced its judgment in 1928 which will be found reported in ¹, and is marked as Exhibit 256 in the present proceedings. Chatfield, C J., held in paragraph 32 of his judgment at page 182 of the Report that no enquiry was held into the conduct of Mar Geeverghese Dionysius who was never placed on his defence or apprised of the charges against him or given any opportunity of defending himself and as such his excommunication was invalid and he continued to be the Malankara Metropolitan and as such the Metropolitan trustee and, therefore, the meeting which removed defendants 5 and 6 was validly convened by a competent Metropolitan. To the same effect were the findings on this point of Joseph Thaliath, J., at page 204 and of Parameswaran Pillai, J., in paragraph 48 of his judgment at page 250. Learned advocate for the then appellants fell back on the case that quite irrespective of the validity of the excommunication Mar Geeverghese Dionysius and his co-trustees could not be permitted to act as trustees for the Jacobite Church as they had rendered themselves aliens to the faith by reason, amongst others, of their repudiating the lawful Patriarch Abdulla II and accepting an unlawful Patriarch Abdul Messiah and by upholding the Catholicate. It was contended on the authority of the decision of the House of Lords in *Free Church of Scotland v Overtoun*², that Mar Geeverghese Dionysius and his adherents had set up a new Church effectively freed from the control of the Patriarch and that if he and his co-trustees were allowed to act as trustees they would divert the trust funds of the former Jacobite Church to the use and benefit of a new and strange church. Chatfield, C J., at pages 190-191 negatived this contention with the following observations —

The objection to the trusteeship of defendants 1 to 3 does not seem to have been stated in this form in the written statements of defendants 4 to 6 and 42. In any case it is not contended that the appointment of a Catholicos is a thing which is in itself forbidden and to work for which is a sign of disloyalty to the church. In the Canon of Nicea as given in both Exhibits A and XVIII there is express provision for a great Metropolitan of the East who was to have power like the Patriarch to consecrate Metropolitans in the East. All that can be urged against the 1st defendant therefore is that he co-operated with one who was not a valid Patriarch when the latter was doing acts which could only be done by a Patriarch or at the worst that he caused this unlawful Patriarch to do such acts. It is conceded by the defendants that if Abdullah had done these acts there would have been no objection. Therefore the whole matter resolves itself into a personal dispute between two claimants to the Patriarchate in which it is said the 1st defendant deserted the Patriarch who had created him Metropolitan and supported his rival. Such conduct might amount to an ecclesiastical offence for which the offender could be deprived by his ecclesiastical superior but it could not be an offence for which the civil Courts could try him or express any opinion as to his guilt.

Further down on the same page the learned Chief Justice concluded

"In the circumstances it cannot be said that the church to which the defendants 1 to 3 belong is a different church from that for which the endowment now in dispute was made. Therefore no question of any loss or forfeiture of trusteeship by the 1st defendant irrespective of Exhibit L or of any threatened diversions of trust funds can arise."

Joseph Thaliath, J., disposed of this point at pages 207-208 of the Report in the following way

"Ordinarily it is for the ecclesiastical tribunals to pronounce whether a person is guilty of an ecclesiastical offence and what the consequences are if one is found so guilty. The decisions of secular Courts with respect to ecclesiastical matters, by the very nature of things, cannot be very satisfactory. We have also to consider the probable inconvenience that will result from the temporal Courts determining whether a person is guilty of any declaration made by proper ecclesiastical tribunals. If we are now to enquire into the alleged offence of schism of the 1st defendant it will come to this. Every time the Metropolitan trustee applies for the interest on the trust fund, there will be some people who are members of the Jacobite Church to object to the payment of interest, on the ground that the Metropolitan cannot act as the trustee of the church since according to them, he is guilty of some heinous ecclesiastical offence or other. And every time a fresh suit will have to be instituted to decide the question. For these reasons it seems to me that the better policy for the temporal Courts to adopt will be not to enter into such questions as long as there has been no pronouncement on the subject made by the ecclesiastical authorities. There has been no such pronouncement in the present case. Hence I have to find this point also against the defendants."

Parameswaram Pillai, J., expressed his views in paragraph 50 of his judgment at page 251 which runs as follows —

50 I have considered this aspect of the case very carefully and have come to the conclusion that there is no substance in this contention. The 1st defendant has not denied the authority of the Patriarch of Antioch and therefore he remains the metropolitan Trustee of the Malankara Church and he claims to draw the money on behalf of that Church. At best what he did was, when Abdulla and Abdul Messiah both claimed to be the Patriarchs of Antioch, he acknowledged the latter as the true Patriarch in preference to the former. If he was wrong in this he has committed a spiritual offence for which his spiritual superiors might punish him in a proper proceeding. This Court has nothing to do with his spiritual offence. *Free Church of Scotland v. Overtoun*¹ referred to in this connection by Sir C P Ramaswami Ayyar, has no bearing upon the facts of this case.

The Full Bench, therefore, upheld the decision of the learned District Judge and confirmed his decree. Accordingly Mar Geeverghese Dionysius and his co-trustees as the lawful trustees became finally entitled to withdraw the moneys deposited into Court.

Within two weeks after this decision was pronounced Mar Julius Elias, the Patriarch's delegate who was in Malankara at the time and who has figured as PW 17 in the present proceedings issued an order (Exhibit 165) suspending Mar Geeverghese Dionysius for having "committed several grave offences against the Holy Throne of Antioch and the faith and practices of the Holy Church and repudiated the authority of the ruling Patriarch."

In view of the raging disputes between the two sections of the community resulting in acute dissension in the church an attempt was made to restore goodwill and amity and to bring about a compromise and at the instance of Lord Irwin, the then Viceroy of India, Patriarch Elias visited Malabar in 1931. Elias, however, died in Malabar before he could effect any settlement. After Elias' death Mar Geeverghese Dionysius on the 7th March, 1932, wrote a letter (Exhibit 65) to the Metropolitan in Syria warning them that if notice was not given to the Malabar Metropolitan before the election of the successor to Elias, they would not recognise the Patriarch so elected without notice. In 1933 Ephraim was

elected as Patriarch of Antioch without, it is said any notice to the Malabar Metropolitans Mar Geeverghese Dionysius and his supporters did not recognise Ephraim as the duly installed Patriarch

In 1934 Mar Geeverghese Dionysius died. A meeting of the Malankara Association was called at M D Seminary. Invitations were issued to all the Churches to attend the meeting. Three months before the meeting was held Patriarch Ephraim issued a Kalpana (Exhibit Z) to the effect that 'those who believed in and supported the Catholicos were aliens to the Church and that none of his followers Metropolitans priests deacons and people should co operate with them or join them in any worship pertaining to the Church. However the meeting was held in December 1934. At this meeting the first appellant Moran Mar Basselios was elected Malankara Metropolitan in the place and stead of Mar Geeverghese Dionysius and Exhibit AM was adopted as the Constitution of the Church. As a counter measure the first Respondent Mar Poulouse Athanasius and other Metropolitans on his side convened a meeting of the Malankara Association at Karingassera. Notice of this meeting it is said was not given to all the Churches which supported the first appellant Moran Mar Basselios. This meeting was held in August 1935. At this meeting the first Respondent Mar Poulouse Athanasius was elected Malankara Metropolitan and the two co trustees of Mar Geeverghese Dionysius namely the second appellant Mani Poulouse Kathanar and E J Joseph were removed from the office of trustee and the second respondent Thukalan Poulo Avira and one Joseph Kathanar were appointed co trustees of the first respondent Mar Poulouse Athanasius.

It was in these circumstances that in 1938 the first and the second Respondents, namely Mar Poulouse Athanasius and Thukalan Poulo Avira Pulathu and the said Joseph Kathanar filed in the District Court of Kottayam a suit (being O S No 111 of 1113) against the first and the second Appellants namely Moran Mar Basselios Catholicos and Mani Poulouse Kathanar and the said E J Joseph. It is out of this suit that the present appeal has arisen and it is necessary therefore to analyse the plaint in some detail. The properties claimed to belong to the Malankara Jacobite Syrian Church and which have to be administered by three trustees namely the Malankara Metropolitan a clergyman and a layman to be elected by the Church are mentioned in paragraphs 1 and 2 of the plaint. The salient facts summarised above as constituting the background of the present disputes are concisely set forth in paragraphs 3 to 12 of the plaint. Reference is then made in paragraphs 13 and 14 of the plaint to the meeting said to be a meeting of the Malankara Association and said to have been held at Karingassera in August, 1935. It is alleged that at that meeting the first plaintiff was elected as the Malankara Metropolitan and the second and third plaintiffs were elected respectively as the clergyman trustee and lay trustee and that the second and the third defendants had been removed from trusteeship. In paragraph 15 is formulated the plaintiffs claim to be in possession of the church properties. In paragraphs 16 to 21 are repudiated the claims of the defendants allegedly founded on their election as the Malankara Metropolitan and trustees at a meeting of the Malankara Association said to have been held in December 1934. It is alleged that the last mentioned meeting was not convened by competent persons nor was due notice given to all the Churches. In paragraph 22 it is stated that for reasons mentioned therein below and more particularly specified in paragraph 26, the first defendant

was disqualified and unfit to be the Malankara Metropolitan. The reasons set forth are five in number and each of them is characterised as amounting to a denial or repudiation of the authority of His Holiness the Patriarch of Antioch. The contentions formulated in paragraphs 23 to 25 are that the acts and pretensions referred to in paragraph 22 constituted heresy and that the first defendant as well as the second and third defendants who were supporting and co-operating with the first defendant had become *ipso facto* heretic and alien to the Malankara Jacobite Syrian Church. Paragraph 26 of the plaint runs thus:

26 The defendant and their partisans have voluntarily separated themselves from the ancient Jacobite Syrian Church and have constituted for themselves, a new Church called Malankara Orthodox Syrian Church. According to the beliefs and doctrines of that Church such functions as consecration of Morone ordination of Metropolitans, granting of stations and allotting Edvagaia to Moronites—privileges which are exclusively within the powers of His Holiness the Patriarch could be done by the first defendant and others without any recourse to His Holiness the Patriarch. Further it is provided that Resussa, which is due to His Holiness the Patriarch, may be paid to the person holding the dignity of Catholicos of the said Church. In short this Act which provides for the permanent constitution of the said Church without any connection with His Holiness the Patriarch and in repudiation and negation of him as well constitutes heresy. The defendants have no right to claim membership of the ancient Jacobite Syrian Church. For these reasons also, the defendants have become disqualified and unfit to be the trustees of or to hold any other position in, or enjoy any benefit from the Jacobite Syrian Church.

The Constitution referred to above is Exhibit AM which is said to have been adopted at the said meeting of December, 1934. The rest of the allegations in the plaint need not be scrutinised in detail except that it may be noted that in paragraph 35 the plaintiffs claimed to maintain the suit not only as trustees but also in their personal capacity as members of the community. The plaintiffs claimed that they be declared the lawful trustees, that the defendants be declared to have no right to retain possession of the Church properties, that the defendants be compelled to surrender and the plaintiffs be put in possession of the said properties, that the defendants be directed to pay mesne profits and render accounts of their administration and of the rents etc., realised by them and that the first defendant be restrained from doing any act as Catholicos or Malankara Metropolitan and the defendants 1 to 3 be restrained from functioning as trustees.

The defendants have filed their written statement denying the contentions of the plaintiffs. In particular they deny that they were guilty of any act of heresy or that even if they were, they *ipso facto* ceased to be members of the Church. Paragraphs 22 to 26 are denied in paragraphs 36 to 38 of the written statement. It is averred that there were not two different Churches or two kinds of faith and that the defendants had not established a separate church and had not separated from the Jacobite Syrian Church. They deny that the meeting said to have been held at Karingassera in August, 1935, was convened by competent persons or was held on notice to all churches. They contend that the said meeting was invalid and the first plaintiff was not validly elected Malankara Metropolitan and the second and third plaintiffs had not been validly elected trustees. It is also pleaded in paragraph 45 of the written statement that it was the plaintiffs and their partisans who had been, from 1085 (1910 A.D.) contending that the Patriarch had temporal power over the properties of the church, that the Patriarch had the power, acting by himself, to excommunicate and ordain Melapattakaren (Bishop), that only the Patriarch might consecrate Morone (Holy Oil), that the canon of Church is the book which was marked as Exhibit 18 in the suit of 1913 and that the Catholicate had not been validly established and that by thus non-co-operating

with and opposing the Malankara Church the plaintiffs had voluntarily separated themselves and had ceased to be members of the Church. In paragraph 46 of the written statement an alternative plea is taken that the plaintiffs and their partisans had lost their rights, if any, to the church properties by adverse possession and limitation. The defendants contend that in the premises the plaintiffs had no title and were not entitled to maintain the suit.

The allegations in the written statement are denied and the averments in the plaint are reiterated in the Replication filed by the plaintiffs. It will suffice to refer only to paragraph 32 thereof which is as follows —

32 The allegations, in paragraphs 42 to 45 of the written statement, are denied. The defendants are barred by reason of *res judicata* from contending in disregard of the findings, in the final decision, in O S 94 of 1988 and the judgment of the Royal Court of Final Appeal, concerning the faith and practices of the Malankara Church the power of the Patriarch over it, and the canons governing it. These contentions, in paragraph 45 of the written statement, are not available to the defendants as they had been raised and found against in the said suits. Whatever might have been the views developed among the members of the community, during the controversy in O S 94 of 1988, the decision in the case binds people of all shades of opinion. The contention is not acceptable, in law, that the right of any party may be lost, or, other rights may accrue to any other party, on the strength of the positions adopted, by them, during the said controversy. The facts relied on for such a position are neither correct nor acceptable. It is not true to say that alterations have been made in the 'Thaksa'."

Certain clarifications called "Pleadings" which are in the nature of interrogatories and answers thereto have been filed by the parties but they need not be referred to at this stage.

Not less than 37 issues have been raised on the pleadings. Of them issues 1 and 2 raise the question of the validity of the respective titles of the three plaintiffs, namely, that of the first plaintiff as the Malankara Metropolitan, and that of the second and third plaintiffs as the trustees of the Church properties and the validity of the Karingassera meeting of August, 1935 and issues 6 and 9 question the validity of the M D Seminary meeting of December, 1934, at which the first defendant was elected as Malankara Metropolitan and the second and third defendants were elected co-trustees of the first defendant. Issues Nos 11, 14, 15, 19 and 20 were as follows —

"11 Is the Patriarch of Antioch, the ecclesiastical head of the Malankara Jacobite Syrian Church or is he only the supreme spiritual head?"

(a) What is the nature, extent and scope of the Patriarch's ecclesiastical or spiritual authority, jurisdiction, or supremacy over the Malankara Jacobite Syrian Church?

(b) Is the Patriarch acting by himself or through the Delegate duly authorised by him in that behalf, the only authority competent to consecrate Metropolitans for Malankara? Or is the consecration a Synodical act in which the Patriarch acts and can act only in conjunction with a Synod of two or more Metrans?

(c) Whether "Kaiyappu" or "the laying on of hands" which is a necessary and indispensable item in the consecration of a Metropolitan should be by the Patriarch or his duly appointed Delegate alone or can it be done by the Catholicos also?

(d) Is the Patriarch alone entitled to and competent to consecrate "Moron" for use in the Malankara Church? Or is the Catholicos also entitled to do it?

(e) Whether by virtue of long standing custom accepted by the Malankara Church and rulings of Courts, the Holy Moron for use in the Malankara Churches has to be consecrated by the Patriarch?

(f) Is the allocation of Dioceses of Edavagais in Malankara a right vesting solely in the Patriarch and whether before exercising jurisdiction in any Diocese the Metropolitan ordained and appointed by the Patriarch (by issuing a *Stasikon*) has only to be accepted by the people of the Diocese? Or is the allocation of Edavagais, so far as Malankara is concerned not a right which the Patriarch or

Catholicos or Malankara metropolitan has or has ever had but a right which vests and has always vested in the Malankara Jacobite Syrian Association? Whether a Metropolitan, before he can exercise jurisdiction in any Diocese in Malankara, must have been either elected for the office before ordination by the Malankara Jacobite Syrian Association duly convened for the purpose or accepted by the same after ordination?

(g) Is the Patriarch the sole and only authority competent to ordain and appoint the Malankara Metropolitan? Is the issue of a Stathicon or order of appointment by the Patriarch either before selection or election by the meeting of the church representatives or after such election or selection essential? Or is such order unnecessary and the election, or acceptance by the Jacobite Syrian Association sufficient?

(h) What is Ressua? Is it a contribution which the Patriarch and Patriarch alone is entitled to levy as a matter of right? Or is it only in the nature of a voluntary gift which may be made to or received by the Patriarch and Catholicos?

(i) Has the Patriarch no temporal authority or jurisdiction or control whatever over the Malankara Jacobite Syrian Church? Or whether as the ecclesiastical head he could exercise and has all along exercised temporal authority by awarding such spiritual punishment as he thinks fit in cases of mismanagement or misappropriation of church assets?

14 Do all or any of the following acts of the 1st defendant and his partisans amount to open defiance of the authority of the Patriarch? Are they against the tenets of the Jacobite Syrian Church and do they amount to heresy and render them *ipso facto* heretics and aliens to the faith?

(i) Claim that the 1st defendant is a Catholicos?

(ii) Claim that he is the Malankara Metropolitan?

(iii) Claim that the 1st defendant has authority to consecrate Moron and the fact that he is so consecrating?

(iv) Collection of Ressua by the 1st defendant?

15 (a) Have the 1st defendant and his partisans voluntarily given up their allegiance to and seceded from the Ancient Jacobite Syrian Church?

(b) Have they established a new Church styled the Malankara Orthodox Syrian Church?

(c) Have they framed a constitution for the new Church conferring authority in the Catholicos to consecrate Moron to ordain the higher orders of the ecclesiastical hierarchy, to issue Stathicons allocating Dioceses to the Metropolitans and to collect Ressua?

(d) Do these functions and rights appertain solely to the Patriarch and does the assertion and claim of the 1st defendant to exercise these rights amount to a rejection of the Patriarch?

(e) Have they instituted the Catholicate for the first time in Malankara? Do the above facts if proved amount to heresy?

19 (a) Have the plaintiffs and their partisans formed themselves into a separate Church in opposition to Mar Geeverghese Dionysius and the Malankara Jacobite Syrian Church?

(b) Have they separated themselves from the main body of the beneficiaries of the trust from 1085?

20 I Do the following acts and claims of the plaintiffs constitute such separation?

(a) (i) The claim that Patriarch alone can consecrate Moron?

(ii) That the Canon of the Church is Ex XXIII in O S 94?

(iii) That the Catholicate is not established?

(iv) That the Patriarch by himself can ordain and excommunicate Metropolitans?

(b) Have the plaintiffs been claiming that the Patriarch has temporal powers over the Church?

(c) Have they been urging that Mar Geeverghese Dionysius was not the Malankara Metropolitan?

(d) Have they made alterations in the liturgy of the Church?

(e) Has the 1st plaintiff executed an Udampady to the Patriarch conceding him temporal powers over the Jacobite Syrian Church and its properties?

(f) Have the Plaintiffs been acting against the trust?

— II Have the plaintiffs and their partisans by virtue of the above acts and claims become aliens to the church and disentitled to be trustees of beneficiaries of the church and its properties?

The suit was heard by the District Judge who by his judgment delivered on the 18th January, 1943, held, amongst other things, that the acts and conduct imputed to the defendants did not, for reasons elaborately discussed by him, amount to heresy or schism or to voluntary separation from the church and that in any event, according to Canon law, there could be no '*ipso facto*' going out of the Church in the absence of decision of an ecclesiastical authority arrived at on proper notice to and after hearing the person accused of heresy or schism. He further held that although the plaintiffs and their adherents, by taking up the position which they had adopted in 1083 (=1910 A D) and persistently maintained up to date had unlawfully and unjustifiably created a split in the Church and been guilty of schism, nevertheless, the plaintiffs could not be said to have become aliens to the Church or formed a separate Church or voluntarily separated from the Church as they had not been punished with removal or excommunication and consequently they had not lost their rights in and to the Church properties as members of the Malankara Church and as beneficiaries. The learned District Judge came to the conclusion that the Karingasseraï meeting of August 1935, had not been convened by competent persons and that as the defendants and their partisans were still members of the Church it could not be said that notice of that meeting had been given to all the churches and that consequently the proceedings of that meeting culminating in the elections of the first plaintiff as the Malankara Metropolitan and of the second and third plaintiffs as trustees were not valid or binding on the defendants and their partisans. The learned Judge also held that the M D Seminary meeting of December, 1934, wherein the elections of the defendants took place was convened by competent persons and that invitations to that meeting had been sent to all churches. In the result, the learned District Judge came to the conclusion that the plaintiffs were not entitled to maintain the suit which was, therefore, dismissed accordingly.

Being aggrieved by the said judgment of the trial Court the plaintiffs appealed to the High Court of Travancore. That appeal (being Appeal No 1 of 1119) was heard by a Full Bench of that Court consisting of Krishnaswamy Iyer, C J and Nokes and Sathyanesan JJ and on the 8th August, 1946 was allowed by a majority of the Judges, the Chief Justice dissenting. Nokes and Sathyanesan, JJ, held that by adopting the written constitution (Exhibit AM) the defendants had repudiated the fundamental principles and tenets of the Malankara Jacobite Syrian Church and had established a new church and had thereby voluntarily separated from and ceased to be members of the Malankara Jacobite Syrian Church. They further held that as the defendants had voluntarily gone out of the Church before the Karingasseraï meeting of August, 1935, they were not entitled to receive any invitation for the said meeting and accordingly the said meeting was validly convened, for notices were given to all churches entitled thereto. The majority Judges held that the plaintiffs had been validly elected as trustees and as such were entitled to possession of the church properties. They accordingly allowed the appeal and passed a decree for possession and other reliefs in favour of the plaintiffs.

On the 22nd August, 1946, that is to say, within a fortnight after the High Court judgment was pronounced, the defendants filed² a petition for review of that judgment on the ground that it contained several mistakes or errors apparent on the face of the record and that in any event there were sufficient reasons for the rehearing of the appeal. At this date Sathyanesan, J, had reverted to his substantive post of a District Judge. Not less than 92 grounds were set forth in

the petition of review. In February, 1947, an affidavit affirmed by Sri E. J. Philipose who was one of the Advocates for the Respondents was filed stating that the statement made by Nokes and Sathyanesan, JJ., that the Respondents' Advocate conceded that the plaintiffs had not left the Church and that they were as good members of the Church as anybody else were inaccurate, incomplete and misleading. Along with that affidavit were produced two letters written to the deponent by his leading Advocate Sri T. R. Venkatrama Sastri whose signature was duly proved by him as genuine. The application came up for *ex parte* hearing in March, 1947, before the Chief Justice, Nokes and Krishnaswamy Pillai, JJ. and orders were reserved. In April, 1947, Nokes, J., retired. On the 4th December, 1947, an order was made directing a notice to issue to the Respondents to show cause why *ex parte* should not be granted. The said petition came up for hearing before a Full Bench of three Judges. The learned Advocate for the Respondents raised a preliminary point to the effect that as one learned Judge (Nokes, J.) had retired and another (Sathyanesan, J.) had reverted to his substantive post of a District Judge, the application for review could not be maintained, and submitted that the application should, therefore, be dismissed *in limine*. That preliminary point was referred to a Bench of five Judges and was rejected on the 29th June, 1949. The Court of Review thereafter took up the hearing of the application on its merits. The petitioners for review confined their objections to fifteen grounds. The Court of Review on the 21st December, 1951, rejected all of them and dismissed the application holding that there was no error apparent on the face of the record and that there were not sufficient reasons for the rehearing of the said appeal. The High Court having declined to grant a certificate under Article 133 of the Constitution the defendants applied for and on the 14th April, 1952, obtained special leave of this Court to prefer this appeal. The appeal has now come up before us for final disposal.

It will be convenient at this stage to discuss and deal with a preliminary point raised by the learned Attorney General appearing for the plaintiffs Respondents. In order to appreciate and deal with the point so raised it will be necessary to take note of the changed conditions that had been brought about in the matter of the judicial administration in the State by the recent political changes culminating in the adoption of the new Constitution of India. It will be recalled that the present review application was made on the 22nd August, 1946 and a notice to show cause was issued on the 4th December, 1947. The preliminary question as to the maintainability of the review application was decided on the 29th June, 1949. During all this period Regulation (IV of 1939) was in force in the State of Travancore. Section 11, omitting the explanations which are not material for our present purpose, and section 12 of that Regulation provided as follows:

(1) (1) A Full Bench shall hear and decide all appeals from the decrees of the District Courts in suits in which the amount or value of the subject matter is not less than five thousand rupees and amount or value of the matter in appeal is not less than that sum. The judgment of the Full Bench or the judgment of the majority, if there be difference of opinion together with the records of the case, shall be submitted to us in order that the judgment may be confirmed by Our Sign Manual.

(2) Notwithstanding anything in the provisions of the Civil Procedure Code, the date of the decree shall be the date on which the judgment is declared in open Court after being confirmed by Our Sign Manual.

Explanation I

(a)

(b)

(c)

Explanation II

12 In cases decided under section 11 of this Regulation a Full Bench of the High Court may admit a review of judgment subject to the provisions of the Code of Civil Procedure. If on review, a fresh judgment be passed the provisions of section 11 shall as far as may be apply.

It will be seen that under section 12 if a fresh judgment be passed then the provisions of section 11 shall, as far as possible apply, that is to say the judgment shall have to be submitted to the Maharaja for confirmation by his Sign Manual and the judgment so confirmed shall have to be declared in open Court after such confirmation. This was the position until the end of June, 1949. In the meantime on the 29th May, 1949 came the Covenant of merger between the Rulers of Travancore and Cochin with the concurrence and guarantee of the then Governor-General of India for the formation as from the 1st July, 1949 of the United State of Travancore and Cochin with a common Executive Legislature and Judiciary. Article III provided that as from the appointed day (*i.e.* 1st July 1949) all rights, authority and jurisdiction belonging to the Ruler of either of the covenanting States which appertained or were incidental to the Government of that State would vest in the United State. Article IV enjoined that there should be a Rajpramukh of the United State the then Ruler of Travancore being the first Rajpramukh during his lifetime. Broadly speaking Articles VI and XI vested the executive and legislative authority of the United State in the Rajpramukh subject to the conditions and for the period therein specified. Article XXI preserved the power of the Rulers to suspend remut or commute death sentences. In exercise of the powers conferred on him by Article XI of the Covenant the Rajpramukh on the 1st July, 1949 promulgated Ordinance No I of 1124. Clause 3 of that Ordinance continued in force for that portion of the territories of the United State which formerly formed the territory of the State of Travancore all existing laws until altered, amended or repealed. Similar provision was made in clause 4 for the continuance of Cochin laws for that part of the United State which formerly formed the State of Cochin. On the 7th July, 1949 however, came Ordinance No II of 1124. Clause 4 of this Ordinance repealed the Travancore High Court Act (Regulation IV of 1099). The relevant part of clause 8 which is important for the purpose of the present discussion was in the terms following

"8 All proceedings commenced prior to the coming into force of this Ordinance in either of the High Courts of Travancore and Cochin hereafter in this Ordinance referred to as the existing High Courts shall be continued and depend in the High Court as if they had commenced in the High Court after such date

The jurisdiction and powers of the High Court were defined thus

18 Subject to the provisions of this Ordinance the High Court shall have and exercise all the jurisdiction and powers vested in it by this and any other Ordinance and under any law which may hereafter come into force and any power or jurisdiction vested in the existing High Courts by any Act or Proclamation in force in the States of Travancore and Cochin immediately prior to the coming into force of this Ordinance

Clause 25 leaving out the two Explanations which are not material for our present purpose and clause 26 ran as follows —

"25 A Full Bench shall hear and decide all appeals from the decrees of the District Courts or the Court of a Subordinate Judge or of a Single Judge of the High Court in Suits in which the amount or value of the subject matter is not less than five thousand rupees and the amount or value of the matter in appeal is not less than that sum

Explanation I

Explanation II

6 In cases decided under section 25 of this Ordinance, a Full Bench of the High Court may admit a review of judgment subject to the provisions of the Travancore and Cochin Codes of Civil Procedure

Clauses 18, 25 and 26 have been substantially reproduced in sections 18 (1), 25 and 26 of the United State of Travancore and Cochin High Court Act, 1125 (Act No. V of 1125) which repealed, amongst other things, Regulation IV of 1099, Ordinance II of 1124. Then came the Constitution of India in 1950 which created a union of several states grouped in Parts A, B and C by the First Schedule. The United State of Travancore Cochin became one of the Part B States. Under Article 214 the High Court of the United State of Travancore and Cochin became the High Court of the Part B State of Travancore Cochin and Article 225 continued the jurisdiction of and the laws administered in the then existing High Court.

The contention of the learned Attorney General is that in view of the changes referred to above which had the effect of setting up a common High Court for the United State of Travancore and Cochin with jurisdiction and power defined therein, the review application has become infructuous, for, even if it be allowed, there will be no authority which will have jurisdiction and power to pronounce an effective judgment after rehearing the appeal. It is pointed out that a review may be admitted under section 26 of the United State of Travancore and Cochin High Court Act, 1125 only in cases decided under section 25 of the Act. This case was not decided by a Full Bench under section 25 of the Act and, therefore, no review is maintainable under section 26. Further, if it be held that the appeal having been filed under section 11 of the Travancore High Court Regulation (IV of 1099), the application for review must be dealt with under section 12 of that Regulation then says the Attorney General if after the review is admitted a fresh judgment has to be passed after rehearing the appeal the provisions of section 11 would have to be complied with namely, the fresh judgment will, under section 11, have to be submitted to the Maharaja to be confirmed by his Sign Manual and the decree will have to be dated as of the date on which the judgment will be declared in open Court after such confirmation. It is pointed out that the Maharaja of Travancore no longer possesses the power to consider and to confirm or reject judicial decisions and it is submitted that such being the position in law the review application, had become infructuous and should have been dismissed by the Full Bench *in limine*. In our opinion this contention is not well founded. The application for review was properly made to the Travancore High Court and the Travancore High Court had to decide whether to admit or to reject the application. The judgment to be pronounced on the application for review did not require, under any provision of law to which our attention has been drawn, to be confirmed by the Maharaja or any other authority. It was a proceeding properly instituted and was pending on the 1st July, 1949 and consequently under section 8 of Ordinance No. II of 1124 had to be continued in the High Court of the United State as if it had commenced in the said High Court after the coming into force of the said Ordinance. In this case, the application for review was rejected by the High Court. If, however, the High Court had admitted the review then such admission would have had the effect of reviving the original appeal which was properly filed in the Travancore High Court under section 11 of the Travancore High Court Regulation (IV of 1099). That appeal, so revived, having been commenced prior to the coming into force

of Ordinance No II of 1124 would, under section 8 of that Ordinance, have had to be continued in the High Court of the United State as if it had commenced in that High Court after such date. The position will be the same if on this appeal this Court now admits the review, for, upon such admission the appeal filed in the Travancore High Court will be revived and then, having been commenced in the Travancore High Court and continued in the High Court of the United State by virtue of section 8 of Ordinance No II of 1124 the appeal so revived will, under section 8 of the Act of 1125, have to be continued in that High Court as if it had commenced in that High Court after the coming into force of that Act. In other words, the old appeal, if restored by this Court on this appeal, will, by the combined operation of section 8 of Ordinance II of 1124 and section 8 of the Act of 1125, be an appeal pending in the High Court of the United State. Under our present Constitution Travancore Cochin has become a Part B State and under Article 214 the High Court of the United State of Travancore Cochin has become the High Court of the Part B State of Travancore Cochin and shall have the jurisdiction to exercise all the jurisdiction of and administer the law administered by the High Court of the United State. Such appeal must, accordingly, be disposed of under section 23 of the last mentioned Act. That section does not require any confirmation of the judgment passed on the rehearing of the appeal by the Maharaja or Rajpramukh or any other authority. Assuming, however, that the appeal, if restored, will have to be governed by section 12 of the Travancore High Court Regulation (IV of 1099) even then the provisions of section 11 would have to be applied 'as far as may be' and it may well be suggested that the portion of section 11 which requires the confirmation by the Maharaja will, in the events that have happened, be inapplicable. In our opinion, therefore, the preliminary objection cannot prevail and must be rejected.

Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 rule 1 of our Code of Civil Procedure, 1908 the Court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See *Chhajju Ram v. Achi*¹. This conclusion was reiterated by the Judicial Committee in *Bisheshwar Pratap Sahu v. Parath Vath*² and was adopted by our Federal Court in *Hari Shankar Pal v. Anath Nath Mitter*³. Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto. As already observed,

¹ (1922) 43 M.L.J. 332 L.R. 49 I.A. I.A. 3,8 I.L.R. 35 All. 634 (P.C.).
² 44 I.L.R. 3 Lah. 127 (P.C.) 3 (1949) 2 M.L.J. 20 (1949) F.L.J.
³ (1934) 67 M.L.J. 608 L.R. 61 125 (1949) F.G.R. 36 at pp. 47-48 (F.C.).

out of the 99 objections taken in the grounds of review to the judgment of the majority of the High Court only 13 objections were urged before the High Court on the hearing of the application for review. Although most of those points have been referred to by learned counsel for the appellants, he mainly stressed three of them before us. We now proceed to examine these objections.

The first objection relates to the validity of the election of the first plaintiff as the Malankara Metropolitan and as such the *ex officio* trustee and the elections of plaintiffs 2 and 3 as his co trustees at the Karingassera meeting. This meeting is pleaded in paragraphs 13 and 14 of the plaint. In paragraph 18 of the plaint the plaintiffs refer to the meeting said to have been held at the M. D. Seminary in December, 1934, on which the defendants rely, the plaintiffs' contention being that that meeting was not convened by competent persons nor after due notice to all the churches according to custom. In paragraph 20 of their written statement the defendants deny the factum or the validity of the Karingassera meeting relied upon by the plaintiffs. They contend that that meeting was not convened by competent persons nor was invitation sent to the large majority of the churches. In paragraph 29 the defendants repudiate the allegations pleaded in paragraph 18 of the plaint and maintain that their meeting was convened properly and upon notice to all the churches in Malankara. In paragraphs 16 and 18 of their replication the plaintiffs reiterate the allegations in the plaint. Issue 1 (b) raises the question of validity of the Karingassera meeting of August, 1935 and issue 6 (a) raises the question of the validity of the M. D. Seminary meeting of December, 1934. As the suit is for possession of the church properties the plaintiffs, in order to succeed must establish their title as trustees and this they can only do by adducing sufficient evidence to discharge the onus that is on them under issue 1 (b) irrespective of whether the defendants have proved the validity of their meeting, for it is well established that the plaintiff in ejectment must succeed on the strength of his own title. It will be noticed that the defendants' objection to the Karingassera meeting was two fold (i) that the meeting had not been convened by competent persons and (ii) that notice had not been given to all the churches. The District Judge in paragraph 164 of the judgment held, for reasons stated by him, that that meeting had not been convened by competent persons and in paragraph 165 he found that notice of the said meeting had not been given to all the churches. It having been conceded by the plaintiffs' Advocate at the time of the final argument before the District Judge that there is no evidence on the plaintiffs' side to prove that all the churches in existence prior to 1886 had been issued notices, the position was taken up that in the view of the plaintiffs' party the defendants and their partisans by adopting the new constitution Exhibit AM had become aliens to the Church and as such were not entitled to be invited to that meeting. Their argument was that Karingassera meeting was only a meeting of the representatives of those churches which stood by the Patriarch Abdulla II and the succeeding Patriarchs and as the defendants and their partisans had become aliens to the Church no notice to them was necessary. This argument clearly amounted to an admission that no notice was sent to the churches on the defendants' side. The District Judge having held, contrary to the submission of the plaintiffs, that the defendants and their partisans had not gone out of the Church it followed, according to him, that they were entitled to notice and as it was not proved that notices were sent to them but on the contrary as it was contended that no notice was necessary to be sent to them the District Judge felt it to be quite clear that the said meeting

was not duly convened. In this view of the matter it was not necessary for the learned District Judge to go further into the matter and enquire whether notices had been given to Churches which had not adopted the new constitution Exhibit AM.

Coming to the judgment of the High Court it appears that the majority of the Judges dealt with the question of the validity of the meeting in a superficial and summary manner. Nokes, J, said —

The lower Court held that the meeting was not duly convened mainly because notice was not given to the defendants party (judgment paragraphs 166-167). The want of notice was not disputed but was justified in accordance with the Patriarchal monition (Exhibit Z). In view of the conclusion stated above that the adoption of the new constitution was clear evidence of the defendants repudiation of the Patriarchal Church and of the fact that the adoption took place in 1934 about 8 months earlier than the meeting at Karingassera the want of notice was justifiable apart from the monition. The lower Court's conclusion that the meeting formed only a minority of the Church is thus erroneous as is the conclusion (judgment paragraphs 164-167) that the meeting was not convened by competent persons.

Mr Justice Sathyanesan simply observed

'The only defect pointed out was that no invitation of the meeting was given to the Churches under the control of 1st defendant. The short answer to this is that having already become members of a new Church they were not entitled to any invitation and were rightly ignored.

It thus appears that the question as to the competency of the persons who convened the Karingassera meeting was disposed of by Nokes, J, in one single sentence at the end of the paragraph quoted above. The learned Judge does not appear to have seriously applied his mind at all to the question of the competency of the convenors of that meeting. Sathyanesan, J, did not deal with the question and thought quite wrongly that the only question raised by the defendants was as to whether notice was given to the Churches under the control of the defendants. It is pointed out by the learned Attorney-General that the judgment of Sathyanesan, J, was only a supplementary judgment, for he prefaced his judgment with the observation that he entirely agreed with the findings of Nokes, J. This argument might have had some force if Nokes, J, had dealt with the point. The position, therefore, is that neither of the Judges applied his mind to the question of the competency of the persons who had convened the Karingassera meeting. As to service of the notice on all Churches, Nokes, J, in the passage quoted above held that the defendants had gone out of the Church by reason of their adoption of the new constitution Exhibit AM and that consequently no notice was due to them. Sathyanesan, J, also in the passage quoted above took the view that the defendants having become members of a new Church the defendants were not entitled to any invitation to the Karingassera meeting. The learned Judges having reversed the finding of the District Judge and held that the defendants had gone out of the Church by adopting the new constitution Exhibit AM it became incumbent on them to enquire whether all Churches not on the plaintiff's side had adopted Exhibit AM and if not whether such of them who had not adopted Exhibit AM had been summoned to the meeting. It may be noted in this context that the learned Judges of the High Court in their judgment seem to indicate that the Churches which adopted Exhibit AM did so by participation at the M. D. Seminary meeting. Reference has been made in the arguments to the various figures set out in the judgment of the District Judge as to the number of Churches which according to the evidence had attended the meeting. It is not clear how many out of 310 Churches claimed by the defendants to have been completely on their side according to Exhibit 272 had attended the

M. D. Seminary meeting and formally adopted the new constitution Exhibit AM. If adoption of the Exhibit AM is the test for determining whether notice is due or not, then it becomes important to consider whether all the Churches which were not with the plaintiffs but who had not adopted Exhibit AM had been served. Apart from the question of the service of the notice there was also the question as to the competency of the persons who had convened the Karingassera meeting where the plaintiffs are said to have been elected. While Mar Geeverghese Dionysius was alive he, as President of the Malankara Association, used to convene the meetings of the Association. Who, after his death, was competent to issue notice of meeting? There appear to be no rules on the subject. In this situation, says the learned Attorney General if all the members of the Association attended the meeting the defect of want of proper notice does not matter. But did all members attend, even if the defendants party who had adopted Exhibit AM be left out? It does not appear that either of the two majority Judges of the High Court adverted to either of these aspects of the matter namely, service of notice to all Churches and competency of the persons who issued the notice of the Karingassera meeting and in any case did not come to a definite finding on the question. The majority judgments, therefore are defective on the face of them in that they did not effectively deal with and determine an important issue in the case on which depends the title of the plaintiffs and the maintainability of the suit. This, in our opinion, is certainly an error apparent on the face of the record.

The next point urged by learned counsel appearing for the plaintiffs is that the majority decision proceeds on a misconception as to a concession said to have been made by the defendants advocate. It will be recalled that issues Nos 14 and 15 quoted above raise the question of the defendants having gone out of the Church, for having committed acts of heresy or having voluntarily given up their allegiance to the ancient Jacobite Syrian Church and establishing a new Church and framing a constitution for the same. Likewise, issues Nos 19 and 20 raise the question as to whether the plaintiffs and their partisans formed themselves into a new Church and separated from the old Church by reason of the several acts and claims therein referred to. Here again the suit being one in ejectment it is more important for the plaintiffs to establish their own title by getting issues 19 and 20 decided in their favour than to destroy the defendants' title by getting issues 14 and 15 decided against the defendants, for a mere destruction of the defendants' title, in the absence of establishments of their own title carries the plaintiffs nowhere. It is to be remembered that this is a suit by the plaintiffs as the validly constituted trustees and not a suit under the section analogous to section 92, Civil Procedure Code, for removal of defendants from trusteeship or for the framing of a scheme. In paragraph 132 of his judgment the learned District Judge found that the acts and claims imputed to the defendants did not amount to heresy and did not make the defendants or their partisans heretics or aliens to the faith and that such acts and conduct mentioned in issue 15, even if proved, would not amount to heresy and would not amount to a voluntary giving up of their allegiance to or secession from the ancient Jacobite Church. On the other hand, in paragraph 133 the District Judge held that the plaintiffs and their adherents by taking up the position which they adopted in 1085 and which they had persistently maintained till then had unlawfully and unjustifiably created a split in the Malankara Church and might in a sense be said to have pursued a course of conduct amounting to persistent schism. He held

that, nevertheless, the plaintiffs and their partisans had not become aliens to the Church or created or formed themselves into a separate Church as they had not been found guilty and punished with the removal from the Church or excommunication from the Church by a proper ecclesiastical authority. It will be noticed that the learned District Judge found the facts imputed to the defendants not proved but the facts imputed to the plaintiffs to have been proved. He made no difference between acts of heresy and merely voluntary separation from the Church but treated them on the same footing. It will be recalled that in the interpleader suit of 1913 the District Judge had held that by accepting Abdul Messiah as their ecclesiastical head or by denying the authority of Abdulla II, Mar Geeverghese Dionysius and his co-trustees had not become aliens to the faith. Finally, in the judgment on rehearing of the appeal reported in¹ from which passages have been quoted above the acts imputed to the defendants in that case which are similar to those imputed to the defendants in the present case, with the exception of the adoption of Exhibit AM were held not to amount to a voluntary separation from the Church by the establishment of a new Church and that the *Free Church case*² had no application to the facts of that case. Likewise, in the present case the District Judge dealt with issues 15, 16, 19 and 20 together, which covered issues on both heresy and voluntary separation. Presumably in view of the decision of the Court of Appeal in the previous suit the learned District Judge in this case did not make any distinction between acts of heresy and voluntary separation from the Church and held that there was "no case of *ipso facto* heresy or *ipso facto* loss of membership of the Church or *ipso facto* loss of status as Priest and prelates for ecclesiastical offences unless the offenders were tried and punished by a competent authority." Indeed the evidence of P W 17, the Pope's delegate, is claimed as supporting this view. It is in the light of this situation that the question as to the misconception of the concession has to be considered. Sathanesan, J., in paragraph 4 of his judgment, referred to the concession said to have been made by the learned advocate for the defendants in the following terms —

However the learned advocate for the respondents clarified the situation by very fairly conceding that plaintiffs had not left the Church and that they were as good members of the original Jacobite Syrian Church as anybody else. Another clarification has been made by the learned advocate for the appellants that the plaintiffs whatever might have happened in the past do not hold that the Patriarch can at all interfere to the internal administration of the Malankara trust properties. Plaintiffs seem to have made their position clear even at the time of pleadings. According to them The Patriarch as the ecclesiastical head of the Malankara Church could exercise that authority by awarding such spiritual punishment as he thinks fit in cases of mismanagement or misappropriation of Church properties — *Ide* pleading No. 124 (i). The concession made by the learned advocate for the defendants has obviated the necessity of a lengthy discussion of several matters. So it is worth pausing a while and understanding the importance and the implications of the concessions. It tends to mean—

(i) that the Patriarch is not an alien to the Church i.e. the Patriarch and his predecessors in question are the true and lawful head of the original Jacobite Syrian Church,

(ii) that the plaintiffs and their partisans holding that

(a) the Patriarch has only a spiritual supervision of the administration of the trust properties by the trustees

(b) the Patriarch alone can consecrate Monks

(c) that Exhibit BP is the true Canon of the Jacobite Church and

(d) that the Catholicate was not properly established cannot, on these grounds, be considered to have become aliens to the original church

Sole question is more properly whether the defendants have seceded from the original Church and formed a new Church. In the nature of the suit, the plaintiffs can succeed only if they make out

(A) that the defendants are using the trust properties belonging to Malankara Jacobite Church for the maintenance support and benefit of another and a different body, namely, Malankara Orthodox Syrian Church and

(B) that the plaintiffs are duly elected trustees.

I Lewis, Nokes, J at pages 355-356 referred to the concession as follows —

"In this Court the defendants advocate did not seek to disturb the finding that the plaintiffs had not become aliens to the Church. Indeed, as previously stated, he based his case on the ground that his parishes were still within the Church. This abandonment of his clients' contention in the lower Court was no doubt due to the fact that the written statement involved an admission of the plaintiffs' case. For the plaintiffs in effect said we are the trustees of the Patriarch's Church. The defendants said we are the trustees of a Church to which the Patriarch is an alien. It was an attempt made here on behalf of the defendants to challenge the finding that the trust had not become altered for any contention to the contrary provided no defence and was a further admission of the plaintiffs' case. But the existence of this allegation on the pleadings serves to emphasise the defendants' attitude to the trust.

Further down the learned Judge said —

"The learned Judge held against the general allegation of separation (judgment, paragraph 133, but in favour of the special allegation as to the plaintiffs' view on temporalities (paragraph 108). He also recorded findings as to the limited scope of the Patriarch's powers in temporal affairs (paragraphs 58, 60), which seem to be based on the erroneous view *inter alia* that persons who are subject to two systems of law are amenable for different aspects of the same offence only to punishment under one system (see paragraph 57). The general finding was challenged in the memorandum of objection (grounds 10 and 11) but not in the argument for the defendants here, which, as previously stated, proceeded on the basis that both sides were still members of the Church."

On a plain reading of the two judgments it appears that the majority Judges took the view that even if, as held by the District Judge, the plaintiffs had been guilty of acts and conduct imputed to them it was not necessary for them to enquire whether those acts were mere heresy or also amounted to a setting up of a new Church or whether the Canon Law requiring the verdict of an ecclesiastical authority applied to both or only to acts of heresy. This attitude they adopted simply because of what they understood was the concession made by the defendants' advocate, namely, that the plaintiffs had not gone out of the Church. They, however, felt bound, notwithstanding the contention of the defendants that they were also, for similar reasons, within the Church, to consider whether the defendants had voluntarily gone out of the Church by setting up a new Church as evidenced by their aforesaid acts. Learned counsel for the appellants contends, and we think there is a good deal of force in such contention, that the majority Judges do not appear to have examined the question or considered whether voluntarily going out of the Church was a concept separate and distinct from acts of heresy and if so whether the acts and conduct imputed to the plaintiffs apart from being acts of heresy from an ecclesiastical point of view, amounted also to voluntarily going out of the Church by establishing a new Church. Nor do they appear to have considered whether the Canon law requiring verdict of an ecclesiastical authority was required in both cases. There can be no doubt, therefore, on the face of the judgment, that the decision of the learned Judges in this behalf proceeds on what they considered was concession made by the defendants' advocate that the plaintiffs had not gone out of the Church. Learned counsel for the defendants appellants contends that this was a misapprehension and he relies on the affidavit of Sri E. J. Philipose, advocate, with which were

produced two letters written to him by the senior advocate. In the first letter it is stated as follows —

"I argued at length of the misconduct of the plaintiffs in going against the basic conditions of the Royal Courts' judgment and said that while the conduct of each party is open to examination neither could be said to have left the Church. Their acts may be set aside in both cases but they cannot be said to have left the Church. The Judges cannot accept it in one case as a concession and in the other case as my submission. Deciding one part of it as a concession not requiring the decision of Court is unjust to my lengthy argument on the misconduct of the plaintiffs in regard to their diversion of property from the trust."

In the second letter we find the following passages —

"Throughout my argument was that the plaintiffs had steadily and consistently set at naught the fundamental principles of the charity as settled in the judgments of the Royal Court and the Cochin Court.

As between the charge and counter charge of violation of the foundation rules I expressed it as my view that while their views may be corrected by the Court neither party should be treated as having become aliens to the Church by reason merely of erroneous views. That is what is explained in paragraph 17 of the grounds. My opinion so expressed is not to be treated as a concession of the one case and a submission as to the other. If my view of the law was not acceptable the learned Judges must decide and not treat one part of a connected statement as a concession not requiring to be considered by the Court.

In the Review petition ground No. 17 is as follows —

'17 Their Lordships' observation that the defendants' advocate based his case on the ground that both parties were still within the Church and that the defendants' advocate conceded that the Plaintiffs have not left the Church and that they were as good members of the original Jacobite Syrian Church as anybody else is inaccurate and incomplete, and misleading. The advocate devoted a great part of the argument to showing that the plaintiffs have departed from the Constitution as settled by the Royal Court Judgment. The plaintiffs stated that the defendants have left the Church. In reply the argument was that there is no such thing as *ipso facto* secession merely because of differences of views on the powers of the Patriarch or about the Canon to be followed. It was in that sense and in that sense only that the argument was advanced that in law it must be taken that both parties were within the Church. The Judges were not justified in taking it out of its setting and using part of it as an admission in support of the plaintiffs and rejecting the other portion as a mere argument not sustainable in law so far as the defendants are concerned. If it should be treated as an admission at all it must have been accepted or rejected as a whole. It must not have been torn piece-meal and part used and part rejected.

The reasons assigned for concluding that the defendants have gone out of the Church apply even more strongly to the plaintiffs and the Judges should have dismissed the suit *in limine*.

Their Lordships failed to note that the basic constitution of the Church had been laid down by the Royal Court judgment and the plaintiffs by disowning and repudiating it had really seceded from it.

If the view of the Court was that departure from the rules of the foundation put the parties out of the Church it should apply alike to both the parties and the statement that neither party had gone out of the Church cannot be used to sustain the plaintiff's right and at the same time rejected as untenable to support the precisely similar rights of the defendants.

Their Lordships failed to note that the defendants' advocate strongly urged that it was necessary to have the charges framed, enquiry held and due and proper grounds made out before a person can be put out of the Church and there was not even a whisper of it as having been complied with in this case.

Their Lordships also failed to note that there can be no such thing as an entire body of persons against whom nothing was alleged or proved being held to have gone out of the Church.

Their Lordships failed to note that the so-called admission did not in any way affect the defendants' case that the Patriarch and the plaintiffs and their partisans have voluntarily left the Church and had thereby ceased to be members thereof."

Learned Attorney-General strongly objects to any reference being made to the facts contained in the affidavit of E. J. Philpote or the letters produced along

with it and he refers us to the decision of this Court in *Sha Mulchand & Company, Ltd v Jawahar Mills, Ltd*¹, and the cases therein referred to and to the case of *Reg v Pestan i Dinsha and another*². It will however, be noticed that what was deprecated in that case was the fact that no affidavit had been filed before the trial Court for the rectification of what in the appeal Court was alleged to have been wrongly recorded by the trial Judge. The Privy Council in *Madhu Sudan Chowdhri v Musammat Chandrabati Choudhrai*³ also suggested that the proper procedure was to move the Court in whose judgment the error is alleged to have crept in. In this case, as already stated an affidavit was filed before the appeal Court itself while the Chief Justice and Nokes J were still in office. Further, if, as laid down in the judgment of this Court to which reference has been made, the proper procedure is to apply to the Court whose judgment is said to be founded on a misconception as to the concession made by the learned advocate appearing before it, by what procedure, unless it be by way of review could that Court be moved? Indeed, the Madras case referred to in the judgment of this Court freely indicates that the application should be by way of review. Patanjali Sastri J (as he then was) sitting singly in the Madras High Court definitely took the view in *Rekhanthi Chinna Govinda Chettiar v S Varadappa Chettiar*⁴ that a misconception by the Court of a concession made by the advocate or of the attitude taken up by the party appears to be a ground analogous to the grounds set forth in the first part of the review section and affords a good and cogent ground for review. The learned Attorney General contends that this affidavit and the letters accompanying it cannot be said to be part of "the record" within the meaning of Order 47, rule 1. We see no reason to construe the word "record" in the very restricted sense as was done by Denning, L J, in *Rex v Northumberland Compensation Appeal Tribunal Ex Parte Shaw*⁵ which was a case of *certiorari* and include within that term only the document which initiates the proceedings, the pleadings and the adjudication and exclude the evidence and other parts of the record. Further, when the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it it will not generally appear on the record but will have to be brought before the Court by way of an affidavit as suggested by the Privy Council as well as by this Court and this can only be done by way of review. The cases to which reference has been made indicate that the misconception of the Court must be regarded as sufficient reason analogous to an error on the face of the record. In our opinion it is permissible to rely on the affidavit as an additional ground for review of the judgment.

Turning to the affidavit and the letters and the ground No 17 of review it is quite obvious that the defendants had not given up their contention, upheld by the District Judge, that the plaintiffs had been guilty of the acts and conduct imputed to them. What the learned advocate for the defendants did was to accept the Canon law as interpreted by the District Judge, namely, that nobody goes out of the Church without the verdict of an ecclesiastical authority, whether the acts complained of amount to acts of heresy or to the establishment of a new Church so as to make the persons who are guilty of such conduct aliens to

1 (1953) 1 M L J 364 (1953) S C J
68 1953 S C R 351 at 366 (S C)

2 10 Bom H C R 75

3 (1917) 21 C W N 897

4 (1939) 2 M L J 809 AIR 1940 Mad.
17

5 L R (1932) 2 K B 338 at 351 352

the faith. If the majority Judges took the view that such was not the Canon law and that the same acts and conduct may have an ecclesiastical aspect in the sense that they amount to heresy punishable as such and may also amount to a voluntary separation from the Church which is not an ecclesiastical offence and does not require the verdict of any ecclesiastical authority to place the guilty person out of the Church then it was clearly incumbent upon the majority Judges to consider whether the acts and conduct of which the plaintiffs had been found guilty had actually been committed by them and whether such acts and conduct also had the dual aspect namely, amounted to an ecclesiastical offence requiring excommunication and also to a voluntary separation which not being an ecclesiastical offence did not require an ecclesiastical verdict to place a guilty person out of the pale of the Church. Thus, on the face of the judgment, the learned Judges failed to do

Learned Attorney-General has submitted that the allegations against the plaintiffs are five in number, namely—

(1) The Patriarch has Temporal powers over the properties of the Malankara Church,

(2) The Patriarch has got the power acting by himself to excommunicate and ordain a Bishop,

(3) Only the Patriarch may consecrate Morone,

(4) The Canon of the Church is Exhibit XVIII of O S 94 of 1088, and

(5) The Catholicate has not been validly instituted in the Malankara Church,

and suggests that these charges have been gone into directly or indirectly by the majority Judges and that, therefore no prejudice has been caused. He, however, cannot dispute that the Judges have failed to consider and come to any definite finding on some of them. We do not consider that the contention of the learned Attorney General is entirely well founded. Issue 20 (1) contains several charges against the plaintiffs and even if charges (a) and (b) have been referred to in the majority judgment, the charges (c), (d) and (e) have certainly not been dealt with. As to the temporal power of the Patriarch the District Judge held in paragraph 58 of his judgment that the Patriarch had no temporal authority or jurisdiction or control over the Malankara Jacobite Syrian Church and its temporalities and that the power of general supervision over spiritual Government conceded to the Patriarch in Exhibit DY did not carry with it by necessary implication the right to interfere in the administration of the temporalities and properties of the Church. The decision to the contrary in 41 T L R 1 cannot be regarded as having any bearing after that judgment was set aside subject only to three points as hereinbefore mentioned. It does not appear that the majority Judges considered whether the plaintiffs imputed full temporal powers to the Patriarch or the limited one as conceded to him in Exhibit DY and if they did impute to him full temporal powers whether they had departed from a fundamental tenet of the Church. They do not also appear to have considered whether, if the plaintiffs originally pledged themselves to the tenet of full temporal power of the Patriarch and thereby departed from a fundamental article and such departure involved their having become aliens, any subsequent change in their attitude by limiting it as in Exhibit DY would make a difference. Further, as to the power of consecrating Metropolitans Nokes, J., found that a validly appointed *Catholicos* had the power, under both versions of the Canon, to consecrate Metropolitans without a Synod and that by so claiming the defendants

had not become aliens to the faith. The learned Judge however, did not consider the implication of this finding so far as the plaintiffs were concerned. This finding may lead to the implication that the claim that the Patriarch alone has got the power of ordination and the Catholicos has not that power cannot but be regarded as a departure from the Canon. Issue 20 (1) (a) (1) which relates to the consecration of Morone has been found in favour of the defendants. If the defendants have not gone out of the Church by making the claim that Morone may be consecrated by the Catholicos or the Metropolitan in Malankara then the learned Judge should have considered whether a denial of such right by the plaintiffs constituted a departure by them from the Canonical law. Thus the learned Judge failed to do Issue 11 (a) / (u) related to the establishment of the Catholicate. In "pleading" No. 4 the plaintiffs maintained that a Catholicate had not been established at all. The District Judge held that Abdul Messiah by his Kalpana Exhibit 80 revived the Jacobite Catholicate. The Respondents' ground of appeal No. 17 assumed that a Catholicate had been established. Nokes, J., held that Abdul Messiah was a Patriarch, that a Patriarch had the power by himself and without the Synod to establish a Catholicate and that a Catholicate had been established by him although the old Catholicate of the East had not been revived. Sathyanesan, J., however, held that the establishment of the Catholicate in Malankara was dubious, surreptitious and uncanonical and that no Catholicate had been established. The two judgments appear to be somewhat at variance in this respect. In any case, Nokes, J., has not considered whether the stand taken by the plaintiffs that no Catholicate had been established at all amounts to a departure by them from the injunctions of the Canon law. On a fair reading of the majority judgments it appears to us that the majority Judges have been misled by a misconception as to the nature and scope of the concession alleged to have been made by the defendants' advocate. If the acts imputed to the defendants amounted to a voluntary separation, the learned Judges should have considered whether the acts imputed to the plaintiffs likewise amounted to a voluntary separation. If the defendants had not gone out of the Church by asserting that a Catholicate had been established, that the Catholicos can ordain Metropolitans and consecrate Morone then they should have considered whether by denying these assertions the plaintiffs had not gone out of the Church. This they failed to do. They could not properly decline to go into the question of fact on account of the admission of the defendants' advocate that the plaintiffs remained in the Church. Such admission at best was an admission as to Canon Law and the decision that the defendants had voluntarily gone out of the Church even in the absence of an ecclesiastical verdict necessarily implies that the concession made by the defendants' advocate requiring an ecclesiastical verdict as a condition precedent to voluntary separation also was obviously wrong and an erroneous concession of law made by the defendants' advocate could not be relied upon for saving the plaintiffs. The fact, therefore that cross-objection No. 11 filed in the High Court by the defendants does not appear to have been pressed makes no difference. In our opinion, for reasons stated above this head of objection raised by the learned advocate for the appellants before us is well founded and the judgments of the majority Judges are vitiated by an error of a kind which is sufficient reason within the meaning of the Code of Civil Procedure for allowing the review.

The last point taken up by the learned advocate for the appellants is that although certain matters had been agreed to be left out in connection with issue

No 11(a), the learned Judges took an adverse view against the defendants on matters which had been so left out by agreement. Issue No 11 relates to the powers of the Patriarch. Clauses (b) to (i) relate to specific powers of the Patriarch. Clause (a) of that issue is vague and is expressed in very general terms. Paragraph 60 of the District Judge's judgment is as follows —

60 It was stated by the advocates on both sides that it is unnecessary for the purpose of this suit to determine or decide in a general and comprehensive manner or define exhaustively all the powers that the Patriarch may have over or in respect of the Malankara Church as the supreme spiritual or ecclesiastical head of the whole Jacobite Church including Malankara and I also think it is not within the province or competency of this Court to attempt to do it. Whether he is the supreme spiritual head or whether he is the supreme ecclesiastical head, his powers as the Patriarch in respect of the matters specified under clauses (b) to (i) of issue 11 (which have formed the subject-matter of dispute in this case) have been considered and defined under these various headings under this issue 11 and it has also been stated how far they have been determined or upheld by law Courts, custom, practice and precedent so far as Malankara is concerned and these findings it is conceded on both sides will suffice.

It will be noticed that after this agreement issue No 11 related only to certain specific powers of the Patriarch. The findings on these issues by themselves do not lead to any result. They were, as it were, only introductory issues and were material for other issues, e.g., issues 14, 15, 19 and 20. In other words, the general issue 11(a) being given up, the other issues mentioned above were automatically limited to the specific acts relating to the specific powers of the Patriarch. The majority Judges have, however, certainly gone into three matters which were then agreed to have been left out, e.g., (a) obligation to obey the Patriarch whether canonically installed or not, (b) extent of the right of the Patriarch by himself to decide matters of faith and (c) whether the Patriarch has the right to approve of a Catholicos in the sense that such approval was necessary. These matters are not averred in pleadings and no specific issues have been raised and, in the circumstances, should not have been gone into. The suggestion is that these points are covered by other issues. It is said that the learned Judges held that the new constitution Exhibit AM amounted to a repudiation of the authority of the Patriarch on the following grounds —

- (1) Installation of Catholicos ignoring the Patriarch,
- (2) absence of a provision for the approval by the Patriarch or Malankara Metropolitan,
- (3) ordination of Metropolitan and the issuing of Staticons by the Catholicos, and
- (4) the right to collect Ressessa.

These points are said to be covered by issues 11 (b), (c), (g), and (h), and also by issues 10 (b), 14, 15 and 16. Assuming it is so, it is clear that the learned Judges also founded themselves on the three points hereinbefore mentioned which do not appear to fall within any of the issues in the case except issue 11 (a) which was given up. To decide against a party on matters which do not come within the issues on which the parties went to trial clearly amounts to an error apparent on the face of the record. It is futile to speculate as to the effect these matters had on the minds of the Judges in comparison with the effect of the other points.

The above discussion, in our opinion, is quite sufficient for the purpose of disposing of this appeal and it is not necessary to go into the several other minor points raised before us. In our opinion the appellants have made out a valid

ground for allowing their application for review. We accordingly allow this appeal set aside the judgment of the High Court and admit the review. As the different points involved in this appeal are intimately interconnected we direct the entire appeal to be reheard on all points unless both parties accept any of the findings of the High Court. The costs must follow the event and we order that the appellants must get the costs of this appeal before us and of the application for review before the High Court.

We need hardly add that the observations that we have made in this judgment are only for the purpose of this application for review and should not be taken or read as observations on the merits of the appeal now restored and to be reheard by the High Court.

Appeal allowed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —B K. MUKHERJEA VIVIAN BOSE AND T L. VENKATARAMA AYYAR, JJ
Satya Dev Bushahri

*Appellant**

Padam Dev and others

Respondents

Representation on of the People Act (XLIII of 1951) sect on 123 (8)—Government servants subscribing nomination paper as proposer and seconder—Effect—Appointment of Government servant as polling agent—If contra venes section 123 (8)

Section 33(2) of the Representation of the People Act 1951 conferred the privilege of proposing and seconding a candidate on any person who was registered in the electoral roll, and section 123 (8) of the Act cannot be construed as taking away that privilege. It cannot be said that the candidate had procured the assistance of Government servants by reason of his nomination paper being subscribed by Government servants as proposer and seconder.

Raj Krishna Bose v Binod Kanungo (1954) S C J 286 followed.

The appointment of a Government servant as a polling agent does not *per se* contravene section 123 (8). So long as the polling agent confines himself to his work as such agent of merely identifying the voters it cannot be said that section 123 (8) has in any manner been infringed. If it is made out that the candidate or his agent has abused the right to appoint a Government servant as polling agent by exploiting the situation for furthering his election prospects, then the matter can be dealt with as an infringement of section 123 (8).

Appeal by Special Leave granted by this Court on the 25th January, 1954, from Judgment and Order dated the 23rd May, 1953, of the Election Tribunal, Himachal Pradesh, Simla, in Election Petition No 14 of 1952.

Hardajal Hardy and R C Prasad, Advocates for the Appellant

Ved Vyas, Senior Advocate (S K Kapur and Naumit Lal, Advocates with him) for Respondent No 1.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J—This is an appeal against the order of the Election Tribunal, Himachal Pradesh, dismissing Election Petition No 14 of 1952. On 12th October, 1951, five candidates (respondents 1 to 5 herein) were duly nominated for election to the Legislative Assembly of the State of Himachal Pradesh for the Rohru Constituency in Mahasu District. The polling took place on 23rd November, 1951, and on 30th November, 1951, the first respondent was declared elected, he having secured the largest number of votes. The result was published

in the Official Gazette on 20th December, 1951. On 14th February, 1952, one of the unsuccessful candidates, Gyan Singh (fifth respondent herein) filed Election Petition No. 14 of 1952 challenging the validity of the election of the first respondent. On 4th August, 1952, he applied to withdraw from the petition, and that was permitted by an order of the Tribunal dated 20th September, 1952. The appellant, who is one of the electors in the Rohru Constituency, then applied to be brought on record as the petitioner, and that was ordered on 21st November, 1952. The petition was then heard on the merits.

Though a number of charges were pressed at the trial, only two of them are material for the purpose of the present appeal: (1) that Sri Padam Dev was interested in contracts for the supply of Ayurvedic medicines to the Government, and was therefore disqualified for being chosen to the Assembly under section 7 (d) of Act No. 43 of 1951, and (2) that he had procured the assistance of Government servants for the furtherance of his election prospects, and had thereby contravened section 123 (8) of that Act. The facts giving rise to this contention were that one Daulataram had subscribed in the nomination paper of Sri Padam Dev as proposer and one Motiram as seconder, both of them being Government servants employed in the post office, and that one Sital Singh, an extra departmental agent, was appointed by Sri Padam Dev as one of his polling agents at a booth at Arhal.

By its judgment dated 25th September, 1953, the Election Tribunal held firstly that section 7 (d) of Act No. 43 of 1951 had not been made applicable to elections in Part C States and that further there was no proof that on 12th October, 1951, the date of nomination, there were contracts subsisting between Sri Padam Dev and the Government. With reference to the charge under section 123 (8), the Tribunal held by a majority that the section did not prohibit Government servants from merely proposing or seconding nomination papers, and that it had not been proved that Daulataram and Motiram did anything beyond that. As regards Sital Singh, while two of the members took the view that section 123 (8) did not prohibit the appointment of a Government servant as polling agent, the third member was of a different opinion. But all of them concurred in holding that this point was not open to the petitioner, as it had not been specifically raised in the petition. In the result, the petition was dismissed. It is against this judgment that the present appeal has been brought by special leave.

The first question that arises for determination is whether Sri Padam Dev was disqualified for being chosen to the Legislative Assembly by reason of his having held at the material dates contracts for the supply of Ayurvedic medicines to the Himachal Pradesh State Government. The answer to it must depend on the interpretation of the relevant provisions of Act No. 49 of 1951, which governs elections to the Legislative Assemblies in Part C States. Section 17 which deals with disqualifications runs as follows:

A person shall be disqualified for being chosen as and for being a member of the Legislative Assembly of a State if he is for the time being disqualified for being chosen as, and for being a member of either House of Parliament under any of the provisions of Article 102.

Article 102 of the Constitution which becomes incorporated in the section by reference is as follows:

102. (1) "A person shall be disqualified for being chosen as and for being a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State other than an office declared by Parliament by law not to disqualify its holder ,
 (b) if he is of unsound mind and stands so declared by a competent Court
 (c) if he is an undischarged insolvent ,
 (d) if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State ,
 (e) if he is so disqualified by or under any law made by Parliament "

We are concerned in this appeal only with Article 102 (1) (e) The contention of the appellant is that Act No 43 of 1951 being a law made by Parliament, the disqualifications laid down under section 7 therein would fall within Article 102 (1) (e), and would under section 17 of Act No 49 of 1951 be attracted to elections held under that Act

The respondent attempted several answers to this contention He firstly contended that as Act No 43 of 1951 did not *proprio vigore* apply to elections in Part C States he was not a person disqualified by or under the terms of that law as required by Article 102 (1) (e) and that therefore he was not hit by section 17 Though this contention might, at first thought sound plausible, a closer examination of the language of section 17 shows that this is not its true import The section does not enact that persons who are disqualified under a law made by Parliament shall be disqualified to be chosen under the Act What it does enact is that if a person would be disqualified to be chosen to either House under an Act of Parliament, he would be disqualified to be chosen for the State Assembly In other words, what would be a disqualification for a candidate being chosen to either House would be a disqualification to be chosen to the State Legislature In this view, it is of no consequence that the candidate was not disqualified under section 7 (d) by its own force

It was next contended that whatever interpretation section 17 might be susceptible of if it had stood alone, read in conjunction with section 8 of Act No 49 of 1951 it must be construed as excluding section (7) (d) of Act No 43 of 1951 Section 8 of Act No 49 of 1951 enacts that Parts I and III to XI of Act No 43 of 1951 and the rules made thereunder apply to all elections under the Act, subject to such modifications as the President might direct Section 7 occurs in Part II of Act No 43 of 1951, and that is not one of the Parts extended under section 8 The argument is that section 7 having been omitted by design from the sections made applicable, the legislature must be taken to have intended that it should not apply to elections held under the Act, and that section 17 should accordingly be so construed as not to defeat that intention Reliance was placed on the well-known rules of construction that the provisions of a statute should be read in such manner as to give effect to all of them, and so as to avoid inconsistency and repugnancy Both the sections can be given their full effect, it was argued, by holding that by reason of the non inclusion of Part II under section 8, section 7 of Act No 43 of 1951 was inapplicable, and that subject to that, the other provisions enacted by Parliament would apply under section 17 But this argument fails to take into account the scheme underlying Act No 49 of 1951 The framers of that Act wanted to enact a comprehensive code of election law for Part C States They had before them Act No 43 of 1951, and they had to decide how much of it they would adopt Part I of Act No 43 of 1951 consists only of short title and the interpretation section, and that was adopted in Act No 49 of 1951 Part II of Act No 43 of 1951 deals with qualifications and disqualifications for membership

That subject is dealt with in sections 7 and 17 of Act No 49 of 1951. Section 7 sets out the qualifications and section 17, the disqualifications. It may also be noted that while disqualification for being chosen to either House of Parliament is laid down as a disqualification under section 17 the electoral roll for Parliament is to be taken under section 6 as the electoral roll for election to the State Assembly for the concerned area. These provisions cover the very ground covered by Part II, and therefore there was no need to extend any portion of it under section 8. Parts III to XI deal with the actual election from the commencement of the notification through all its stages and matters connected therewith, and they have been adopted *en bloc* in Act No 49 of 1951. That being the general scheme, it is not possible to read into the omission of Part II under section 8 an intention that the disqualifications mentioned in section 7 should not apply to elections held under the Act. Nor is there any inconsistency between section 8 which passively omits Part II, and section 17 which positively enacts that what would be a disqualification under Article 102 would be a disqualification for the purpose of this Act.

A good deal of argument was addressed to us based on the substantial identity of the language of section 17 with that of section 11 of Act No 43 of 1951 which also occurs in Part II which contains section 7. The contention is that if section 7 of Act No 43 of 1951 could be construed as comprised in section 17 of Act No 49 of 1951, it should also be held to have been comprised in section 11 of Act No 43 of 1951, in which case, there was no need to enact two provisions in the same Act, one overlapping the other. The simpler thing, it was argued, would have been to include section 11 in section 7 or *vice versa*. All this difficulty could be avoided according to the respondent if the reference to Article 102 in section 11 is interpreted as limited to Article 102 (1) clauses (a) to (d) and not as including Article 102 (1) (e), in which case the same construction should logically be adopted for section 17. But this reasoning is inconclusive because the scope of section 7 and that of Article 102 which is incorporated by reference in section 11 are different. It must further be noted that section 11 occurs in a Chapter which deals exclusively with qualifications and disqualifications for membership to electoral college in Part C States. It is therefore not possible to draw any inference from the non inclusion of section 7 in section 11 or *vice versa*. On the other hand the construction contended for by the respondent would give no meaning to the words "disqualified for being chosen as a member of either House of Parliament" in section 17. The result is that the qualifications laid down in section 7 of Act No 43 of 1951 must be held to be comprised within section 17 of the Act.

It was then contended that even on the footing that section 7 of Act No 43 of 1951 was comprised in section 17 of Act No 49 of 1951, the respondent was not disqualified because under section 7 (d) it would be a disqualification only if the candidate had entered into contracts with the appropriate Government, and under section 9 (1) (a) "appropriate Government" would mean, in relation to any disqualification for being chosen to either House of Parliament, "the Central Government", and in relation to any disqualification for being chosen to the Legislative Assembly or Legislative Council, "the State Government". It was argued that adopting the test that what would be a disqualification for being a member of either House of Parliament under Article 102 would under section 17 be a disqualification for being chosen to the State Assembly, to operate as a disqualification the contract must be with the Central Government, that in the present case,

the contracts, if any, were with the Himachal Pradesh State Government, and that therefore the respondent was not a person who would be disqualified for being elected to either House, and would in consequence be not disqualified for being elected to the State Legislative Assembly

The appellant did not dispute the correctness of this position. He contended that, as a matter of law, the contracts of Sri Padam Dev were with the Central Government and that therefore he would be disqualified under the terms of section 7 (d) read with section 9. The basis for this contention is Article 239 of the Constitution, which enacts that the States specified in Part G shall be administered by the President through a Chief Commissioner or Lieutenant Governor to be appointed by him. Reference was also made to Article 77, which provides that all executive action of the Government of India shall be expressed to be taken in the name of the President. The argument is that the executive action of the Central Government is vested in the President, that the President is also the executive head of Part G States and that, therefore, the contracts entered into with Part G States, are, in law, contracts entered into with the Central Government. The fallacy of this reasoning is obvious. The President who is the executive head of the Part G States is not functioning as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Article 239. The authority conferred under Article 239 to administer Part G States has not the effect of converting those States into the Central Government. Under Article 239, the President occupies in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Though the Part G States are centrally administered under the provisions of Article 239, they do not cease to be States and become merged with the Central Government. Articles 240 and 241 provide for Parliament enacting laws for establishing legislative, executive and judicial authorities for those States and Act No 49 of 1951 was itself enacted under the power conferred under Article 240. Section 38 (2) of that Act provides that all executive action of the State shall be expressed to be taken in the name of the Chief Commissioner. It will be seen that while the executive action of the Central Government is to be taken under Article 77 in the name of the President, that of Part C States is to be taken under section 38 (2), in the name of the Chief Commissioner. Thus, there is no basis for the contention that contracts with Part G States are to be construed as contracts with the Central Government. Nor has the appellant established as a fact that there were any contracts between Sri Padam Dev and the Central Government. The records only show that the dealings were with the Chief Commissioner, who was in charge of the administration of the State of Himachal Pradesh. The contention of the appellant that the contracts of Sri Padam Dev were with the Central Government cannot be supported either in law or on facts. It may seem anomalous that while under sections 7 (d) and 9 (1) of Act 43 of 1951 a contract with the State would operate as a disqualification for being chosen to the State Legislature and a contract with the Central Government would operate as a disqualification for being chosen to either House of Parliament, the respondent should be held to be not disqualified for election to the State Legislature when he holds a contract with the State Government. But that is because section 7 (d) was not in terms extended to elections in Part C States, and came in only with the qualifications mentioned in section 17.

In this view, the further question whether Sri Padam Dev held contracts with the Government at the material dates is only of academic interest. Counsel

heading related to the subscribing of the nomination paper by Daulataram as proposer and Motiram as seconder. This question has since been decided adversely to the appellant in a recent decision of this Court reported in *Raj Krishna Bose v Binod Kanungo*¹, where it was held that section 33 (2) conferred the privilege of proposing or seconding a candidate on any person who was registered in the electoral roll, and that section 123 (8) could not be construed as taking away that privilege. This objection must, therefore, be overruled.

Then there is the question whether the appointment of Sital Singh as polling agent contravened section 123 (8). The majority of the Tribunal was of the opinion that the appointment of a Government servant as polling agent was not by itself objectionable, but the third member thought otherwise. They, however, agreed in deciding the point against the appellant on the ground that it had not been expressly raised in the petition. It was argued for the appellant that as it was admitted at the trial that Sital Singh was appointed polling agent, the point was open to him as it was a pure question of law. As the facts are admitted, and the question itself has been considered by the Tribunal, and as the point is one of considerable practical importance, we have heard arguments on it.

Section 46 of Act No. 43 of 1951 empowers a candidate to "appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station". Rule 12 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, prescribes the formalities to be observed in the appointment of such agents, and Form 6 framed thereunder provides for the polling agent signing a declaration that he would do nothing forbidden by section 128. That section enjoins that every agent shall maintain and aid in maintaining the secrecy of the voting. Thus, here is nothing in the Act or in the Rules barring the appointment of a Government servant as a polling agent. And on the reasoning adopted in *Raj Krishna Bose v Binod Kanungo*¹, with reference to section 33 (2), the conclusion must follow that such appointment does not *per se* contravene section 123 (8). Nor is there anything in the nature of the duties of a polling agent, which necessarily brings him within the prohibition enacted in that section. The duty of a polling agent is merely to identify the voter, and that could not by itself and without more, be said to further the election prospects of the candidate. So long as the polling agent confines himself to his work as such agent of merely identifying the voters, it cannot be said that section 123 (8) has, in any manner, been infringed.

It is argued for the appellant that leaving aside the world of theories and entering into the realm of practical politics, the appointment of a Government servant as polling agent by one of the candidates must result in the dice being loaded heavily against the other candidate, and that situations might be conceived in which the presence of a Government servant of rank and importance as polling agent of one of the candidates might prove to be a source of unfair election practices. But if that is established, and if it is made out that the candidate or his agent had abused the right to appoint a Government servant as polling agent by exploiting the situation for furthering his election prospects, then the matter can be dealt with as an infringement of section 123 (8). But the question which

we have got to decide is whether as an abstract proposition of law the mere appointment of a Government servant as a polling agent is in itself and without more, an infringement of section 123 (8). Our answer is in the negative. In the present case, the finding is that beyond acting as polling agent Sital Singh did nothing. Nor is there any finding that the respondent in any manner availed himself of his presence at the polling booth to further his own election prospects. Thus there are no grounds for holding that section 123 (8) had been contravened.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —S R DAS, N H BHAGWATI AND B JAGANNADHAS, JJ.

Civil Appeal No 3 of 1953

E D Sassoon & Company, Limited

*Appellant**

The Commissioner of Income-Tax, Bombay City

Respondent

Civil Appeal No 30 of 1953

The Commissioner of Income-Tax, Bombay

*Appellant**

Messrs. Agarwal & Company Limited, Bombay

Respondent

Civil Appeal No 31 of 1953

The Commissioner of Income-Tax/Excess Profits Tax,
Bombay City, Bombay

*Appellant**

Messrs Chidambaram Mulraj & Co, Limited

Respondent

Income tax Act (XI of 1922), section 4 (1) (a)—Scope—Managing Agency whose remuneration is payable annually—Transfer of Managing Agency in the middle of a year—Income if can be apportioned for purposes of assessment to tax—Section 26 (2) of Income tax Act—If attracted—Transfer of Property Act (IV of 1882), section 36—Appl. cability

Das and Bhagwati JJ (Jagannadhas J, contra)—When remuneration or commission is expressed at so much per annum without anything more it would amount in law to a stipulation for the payment of remuneration per year and the servant would not be entitled to get any remuneration unless and until he has completely performed his contract and such performance would be a condition precedent to the recovery of any wages or salary for that definite period of service. That would be the position even if the remuneration was to accrue due and become vested at stated periods and unless the servant performed the condition and fulfilled his duty as a faithful servant down to that stipulated date or the stated period no salary would accrue due and become payable to him until at the end of such period of service.

[The Managing Agency Agreements in the instant case were found to be entire and indivisible contracts stipulating a payment of remuneration or commission per year and enjoined on the Managing Agents the duty and obligation of rendering services to the Company for the whole year by way of condition precedent to their earning any remuneration or commission for the particular accounting year.] No 'debt' is created in favour of the Managing Agents till the completion of the period mentioned and where there is a transfer of the Managing Agency in the middle of an year the transferees were not entitled to the remuneration up to the date of transfer though they had rendered service as Managing Agents of the Company for the broken period. What the transferees obtained under the deeds of assignment and transfer was the expectancy of earning a commission in the event of the condition precedent by way of complete performance of the obligation of the Managing Agents under the Managing Agency Agreements being fulfilled and a debt arising in favour of the Manag-

ing Agents at the end of the stated periods of service contingent on the ascertainment of net profits as a result of the working of the Company during the calendar year. What the transferees received from the companies under the terms of the Managing Agency Agreements which were thus transferred to them would be their income and no part of such income could ever be said to have accrued to the transferors during the chargeable accounting period.

Whatever was the contribution of the transferors towards the earning of that commission during the whole calendar year was the subject matter of the assignment in favour of the transferees and that was sufficient to spell out a contract to the contrary as provided in section 36 of the Transfer of Property Act. Section 26 (2) of the Income tax Act is not attracted to the case either. In order to attract the operation of that section the person succeeded must have had an actual share in the income profits or gains of the previous year and in the instant case it has been found that the transferors could not be said to have acquired any share in commission for the broken periods.

The true test under section 4 (1) (a) of the Income tax Act is not whether the transferors and the transferees had worked for any particular periods of the year but whether any income had accrued to the transferors and the transferees within the chargeable accounting period.

The transferor is not liable to tax in respect of that remuneration.

Per Jagannadhai, J.—The profits and gains of the whole year relate to the business carried on both by the assignor and the assignee taken together and are hence taxable as income accruing to both and apportionable as such between them. Section 26 (2) of the Income tax Act also applies to the case.

On Appeal from the Judgment and Order, dated the 12th day of September, 1951 of the High Court of Judicature at Bombay in Income tax Reference No. 27 of 1951, arising out of the Order dated the 23rd day of November, 1949, of the Income Tax Appellate Tribunal in Income Tax Appeal No. 122 of 1947-48, etc.

B J M MacLenna Senior Advocate, (*D H Duarka Das*—permitted to appear under Rule 6 Order II, S C R. and *Rajinder Laran*, Advocate, with him) for the Appellant in C A No. 3 of 1953.

M C Setalvad, Attorney General for India (*G N Joshi* and *P A Mehta*, Advocates with him) for the Respondent in C A No. 3 and for the Appellant in C A Nos. 30 and 31.

C A Dephtary, Solicitor General for India (*R J Kolah*, *N A Palkhualala* and *I A Shroff*, Advocates, with him) for the Respondent in C A No. 30.

R J Kolah, *N A Palkhualala* and *I A Shroff* Advocates, for the Respondent in C A No. 31.

The Court delivered the following Judgments —

Das and Bhagnati, JJ. (Delivered by *Bhagnati, J.*)—These appeals arise out of two judgments and orders of the High Court of Judicature at Bombay in Income-tax References Nos. 23, 24 and 27 of 1951 made by the Income tax Appellate Tribunal under section 66 (1) of the Indian Income tax Act and section 21 of the Excess Profits Tax Act.

E D Sassoon & Company, Ltd. (hereinafter referred to as the Sassoons) were the Managing Agents of (1) *E D Sassoon United Mills, Ltd.*, under agreements, dated the 24th February, 1920 and the 2nd October, 1934, (2) *Elphinstone Spinning & Weaving Mills Company, Ltd.*, under the agreement, dated 23rd May, 1922 and (3) *Apollo Mills, Ltd.*, under the agreement dated the 23rd May, 1922. The Sassoons agreed to transfer their managing agencies of the said companies to Messrs *Agarwal & Co.*, *Chudambaram Mulraj & Co., Ltd.* and *Rajputana Textile (Agencies) Ltd.*, respectively by letters, dated the 3rd September, 1943, 16th April, 1943 and the 27th April, 1943. The consent of the shareholders of the

respective companies to the agreements for transfer was duly obtained and the Managing Agencies were ultimately transferred to the respective transferees with effect from the 1st December, 1943, 1st June, 1943 and 1st July, 1943, respectively. The Sassoons executed in favour of Messrs Agarwal & Co, Chidambaram Mulraj & Co, Ltd, and Rajputana Textile (Agencies) Ltd, formal deeds of assignment and transfer and received from them Rs 57,80,000, Rs 12,50,000 and Rs 6,00,000 respectively on transfers of the Managing Agencies, and the net consideration, viz, Rs 75,77,693 received by them on such transfers was taken by them to the "Capital Reserve Account". The accounts of the Managing Agency commission payable by the respective companies to the Managing Agents for the year 1943 were made up in the year 1944 and Messrs Agarwal & Company received from the E. D. Sassoon United Mills, Ltd a sum of Rs 27,94,504, Chidambaram Mulraj & Co, Ltd received from the Elphinstone Weaving & Spinning Mills Co, Ltd, a sum of Rs 2,37,602 and the Rajputana Textile (Agencies) Ltd, received from the Apollo Mills, Ltd, a sum of Rs 3,82,608 as and by way of such commission.

For the assessment year 1944-45 and the chargeable accounting period 1st January, 1943 to the 31st December, 1943, the original income-tax and excess profits tax assessments of the Sassoons were made on the 31st May, 1945, at a total income of Rs 46,48,483. This income, however, did not include any part of the Managing Agency commission received by the transferees. The entire amounts of the Managing Agency commission received by the transferees were assessed by the Income tax Officer for the assessment year 1945-46 as the income of the transferees. The transferees appealed to the Appellate Assistant Commissioner who confirmed the orders of the Income tax Officer. When the matter was taken in further appeal to the Income tax Appellate Tribunal the Tribunal by its order dated the 28th December, 1949, accepted the transferees' contention that the Managing Agency commission received by them should be apportioned on a proportionate basis and the transferees should be made liable to pay tax only on the commission earned by them during the period that they had worked as the Managing Agents of the respective companies.

The Income tax Officer and the Excess Profits Tax Officer appear to have discovered that the amounts of the Managing Agency commission earned by the Sassoons prior to the dates of the respective transfers were not brought to tax and therefore issued on the 29th June, 1946 notices under section 34 of the Indian Income tax Act and section 13 of the Excess Profits Tax Act upon the Sassoons on the ground that their income from the Managing Agency had escaped assessment. The Income tax Officer and the Excess Profits Tax Officer wanted to include in the assessable income of the Sassoons Rs 28,51,934 made up of Rs 25,61,629 in respect of the Managing Agency of the E. D. Sassoon United Mills, Ltd, for the period of 11 months from the 1st January, 1943, to the 30th November, 1943, Rs 99,001 in respect of the Managing Agency of the Elphinstone Spinning and Weaving Mills, Ltd, for the period of five months from the 1st January, 1943 to the 31st May, 1943 and Rs 1,91,304 in respect of the Managing Agency of the Apollo Mills, Ltd, for the period of six months from the 1st January, 1943, to the 30th June, 1943 contending that such Managing Agency commission had accrued to the Sassoons for services rendered so that on the dates on which the Agencies were transferred the Sassoons were entitled to such remuneration from the managed com-

pani's in the form of commission for services rendered up to the dates of the transfers. In spite of the objection of the Sassoons the Income tax Officer and the Excess Profits Tax Officer determined these sums as their escaped incomes and assessed them accordingly. The Sassoons appealed to the Appellate Assistant Commissioner who dismissed the appeals and further appeals were taken to the Income tax Appellate Tribunal. The Income tax Appellate Tribunal relied upon its order, dated the 28th December, 1949 in the case of the transferees and confirmed the orders of the Appellate Assistant Commissioner. The Tribunal was of the opinion that the Managing Agency commission was earned for services rendered and therefore it was taxed in the hands of the person who carried on the business of the Managing Agency and not in the hands of the person to whom it was assigned, and that heretofore so far as the Sassoons were concerned the Managing Agency commission should be apportioned between them and their transferees.

The Sassoons applied under section 66 (1) of the Indian Income tax Act and section 21 of the Excess Profits Tax Act requesting the Tribunal to draw a statement of the case and refer the question of law arising out of the orders to the High Court for its decision. On the 12th January, 1951, the Tribunal by its statement of the case referred to the High Court one question of law as arising out of its orders viz.,

whether in the circumstances of the case was the Managing Agency commission liable to be apportioned between the assessee company and the assignee

observing that in its opinion that question was not *when* the Managing Agency commission accrued but the real question was *to whom* it accrued. This reference was made by the Tribunal in R. A. No. 474 of 1950-51 and R. A. No. 475 of 1950-51 referring the question of law thus framed in regard to the Managing Agency commission of the E. D. Sassoon United Mills, Ltd. and the Elphinstone Spinning and Weaving Mills, Ltd. the whole of the Managing Agency commission having been paid respectively to Messrs. Agarwal & Company and to Chidambaram Mulraj & Co., Ltd., in the year 1944. This was Income tax Reference No. 27 of 1951.

The Commissioner of Income tax/Excess Profits Tax, Bombay City, also required the Tribunal to refer to the High Court the question of law arising out of its order in the appeal of Messrs. Agarwal & Company in which the Tribunal had held as above that the Managing Agency commission should be apportioned between the Sassoons and the transferees. The statement of the case was accordingly submitted by the Tribunal on the 12th January, 1951 and the same question as above was referred to the High Court. This reference was Income tax Reference No. 24 of 1951.

A similar application was made by the Commissioner of Income tax/Excess Profits Tax, Bombay City, for reference in the appeal of Chidambaram Mulraj & Co., Ltd. The Tribunal submitted its statement of case also on the same day and referred the very same question to the High Court. This reference was Income tax Reference No. 23 of 1951.

All these references came for hearing and final disposal before the High Court. Income tax References Nos. 24 and 27 of 1951 were heard together and one judgment was delivered, answering the question submitted to the High Court in both the references in the affirmative. Following upon this judgment the High Court also answered in the affirmative the question which had been referred to it by the Tribunal in Income tax Reference No. 23 of 1951. The decision of the High Court

was thus against the contentions which had been urged both by the Sassoons and the Commissioner of Income tax and the Sassoons as well as the Commissioner of Income-tax obtained leave under section 66-A (3) of the Indian Income-Tax Act and section 133 (1) (c) of the Constitution for filing appeals to this Court. The appeal of the Sassoons was Civil Appeal No. 3 of 1953 and it was filed against the Commissioner of Income tax, Bombay City. The appeals of the Commissioner of Income tax against Messrs Agarwal & Co and Chidambaram Mulraj & Co, Ltd, respectively were Civil Appeal No. 30 of 1953 and Civil Appeal No. 31 of 1953. These appeals have come for hearing and final disposal before us.

All the appeals raise one common question of law, *viz.*, whether in the circumstances of the case the Managing Agency commission was liable to be apportioned between the Sassoons and their respective transferees in the proportion of the services rendered as Managing Agents by each one of them and the decision turns upon the question whether any income had accrued to the Sassoons on the dates of the respective transfers of the Managing Agencies to the transferees or at any time thereafter. This judgment will cover our decision in all the appeals.

It will be convenient at this stage to set out the relevant clauses of the respective Managing Agency Agreements and the deeds of assignment and transfer.

The original agreement with the E D Sassoon United Mills, Ltd, was entered into on the 24th February, 1920, by Sir Edward Sassoon and others carrying on business in partnership in the style and form of Messrs E D Sassoon & Co. The Managing Agency was transferred with the consent of the company by E D Sassoon & Company to the Sassoons and another Managing Agency Agreement was executed between the company and the Sassoons on the 2nd October, 1934, appointing and recognising the latter as the Agents of the company from the 1st January, 1921, for the residue of the period and upon the same terms and conditions set out in the original agreement, dated the 24th February, 1920. Under clause 1 of that agreement the Sassoons and their assigns were appointed the Agents of the company for a period of 30 years from the date of the registration thereof and thereafter until they resigned or were removed from office by a special resolution of the company. Under clause 2 the remuneration of the Sassoons and their assigns was fixed at a commission of $7\frac{1}{2}$ per cent per annum on the annual net profits of the company after making all proper allowances and deductions from revenue for working expenses chargeable against profits, provided however that if in any year no such commission was earned or it fell short of Rs 1,20,000 the company was to pay to them a sum sufficient to make up the *minimum* remuneration of Rs 1,20,000 per annum on account of such commission. The said commission was under clause 2 (d) to be due to them yearly on the 31st of March in each and every year during the continuance of the agreement and was to be payable and to be paid immediately after the annual accounts of the company had been passed by the shareholders. Under clause 3 the Sassoons and their assigns agreed with the company that they would be and act as the Agents of the company during the said term for the said remuneration and upon and subject to the terms and conditions therein contained. Clause 10 of the Agreement provided as under

"It shall be lawful for the said firm to assign this Agreement and the rights of the said firm hereunder to any person, firm or company having authority by its constitution to become bound by the obligations undertaken by the said firm hereunder and upon such assignment being made and notified to the said Company the said Company shall be bound to recognise the person or firm or company aforesaid as the Agents of the said Company in like manner as if the name of such person, firm

or company had entered into this Agreement with the said Company and the said Company shall forthwith upon demand by the said firm enter into an Agreement with the person, firm or company aforesaid appointing such person, firm or company the Agents of the said Company for the then residue of the term outstanding under the Agreement and with the like powers and authorities remuneration and emoluments and subject to the like terms and conditions as are herein contained'

The letter, dated the 3rd September, 1943, recording the agreement of transfer of the Managing Agency provided that in the event of the transaction being completed in its entirety as therein stated the transferees would be entitled to receive the commission payable by the Company under the Managing Agency Agreement on the profits for the calendar year 1943. The deed of assignment and transfer executed between the Sassoons and Messrs Agarwal & Company in pursuance of this agreement on the 26th January, 1945, stated that the Sassoons thereby transferred to Messrs Agarwal & Company as from the 1st December, 1943, their office as Managing Agents of the Company for the unexpired residue of the term created by the said Agreement, dated the 24th February, 1920, as also the said Agreements, dated the 24th February, 1920 and the 2nd October, 1934 and all their rights and benefits as Managing Agents under the said Agreements and Messrs Agarwal & Company agreed to be the Managing Agents of the Company from the 1st December, 1943, in place and stead of the Sassoons for the said unexpired residue of the term with like powers, authorities, remuneration and emoluments as were contained in the said Agreements. It may be noted that even though the letter recording the agreement of transfer expressly provided that the transferees would be entitled to receive the commission payable by the Company under the Managing Agency Agreement on the profits for the calendar year 1943 no such term was incorporated in the deed of assignment and transfer.

The original agreement entered into by the Elphinstone Spinning & Weaving Mills Co., Ltd., was with Messrs Hajee Mahomed Hajee Esmail & Company and was dated the 24th July, 1919. The Managing Agency was transferred with the consent of the Company by Messrs Hajee Mahomed Hajee Esmail and Company to the Sassoons and on the 23rd May, 1922, another Managing Agency Agreement was executed by the Company in favour of the Sassoons, their successors and assigns employing them the Agents of the Company from the 1st February, 1922, for the unexpired period of the term of 60 years commencing from the 3rd July, 1919. Under clause 3 of the Agreement the Company was during the continuance thereof to pay to the Sassoons, their successors and assigns by way of remuneration a commission of ten per cent on the net profits of the Company and a further sum of Rs 1,500 per month. Under clause 6 the Sassoons, their successors and assigns were to be at liberty to retain, reimburse and pay themselves out of the moneys of the Company *inter alia* all sums due to them for commission and otherwise. The deed of transfer executed by the Sassoons in favour of Chidambaram Mulraj & Co., Ltd., on the 2nd June, 1943, stated that the Sassoons assigned and transferred the Agreement, dated the 23rd May, 1922, between themselves and the Company for the unexpired residue of the term of sixty years specified therein and the full benefit and advantage thereof together with the benefit of the Agency and the office of the Agents thereunder and the right to receive the remuneration thereafter to become payable by the Company under or by virtue of the said Agreement and together with the benefit of all rights, privileges, powers and authorities given and conferred on the Sassoons thereunder.

It is significant to observe that before the income-tax authorities as also the High Court no distinction was drawn between the provisions of these two Agency Agreements in regard to the right of the Managing Agents to remuneration thereunder and the facts in so far as they related to all the Managing Agencies were treated as similar. The quantum also was not disputed in each case though the principle of apportionment was in dispute.

The Sassoons were assessed for this "escaped income" on the basis that they had earned the income by rendering services as Managing Agents to the Companies for the respective periods that they continued to be the Managing Agents and the transferees had rendered the services for the balance of the periods completing the full year of accounting and had earned the proportionate commission and therefore the amount of commission which the later actually received included the Sassoons' share of commission in respect of which they were not liable to tax but the Sassoons. The High Court adopted this test of the services rendered by the Sassoons as well as the transferees during the whole of the year and considered the proportions of the services rendered by the Sassoons and the transferees as the Managing Agents of the Companies as decisive of the portions of the Managing Agency commission earned respectively by each. The parenthood of the income received by the transferees was considered to be the real test of the apportionability of the amounts of the Managing Agency commission and the total amount of the Managing Agency commission was thus apportioned between the Sassoons and the transferees in the proportion of 11 to 1 in the case of the E. D. Sassoon United Mills, Ltd. and 5 to 7 in the case of the Elphinstone Spinning and Weaving Mills Co., Ltd., the transfers of the Managing Agencies having been made with effect from the 1st December, 1943 and the 1st June, 1943, respectively. The income was held assessable to tax not on the basis of receipt but on the basis of accrual. The receipt by the transferees was considered of no consequence. What was received by the transferees was treated as including the proportionate shares of the Sassoons in the income which could be attributed to their periods of service as the Managing Agents of the respective Companies and even though actually received by the transferees they were treated as income which had accrued to the Sassoons by reason of their having acted as the Managing Agents of the respective Companies for the respective periods. The Sassoons' shares of the income were thus considered as having been earned by them during the year 1943 and were held on the construction of the deeds of assignment and transfer executed by the Sassoons in favour of the transferees as having been assigned by them to the transferees and even though the transferees received the whole of the Managing Agency commission payable by the Companies to the Managing Agents under the terms of the respective Managing Agency Agreements, the Sassoons, the assignors and not the transferees the assignees were assessed to tax in respect of the proportionate shares of income earned by the Sassoons in the year 1943.

It was urged before us on behalf of the Sassoons that no part of the managing agency commission for the broken periods of 1943 was earned by them. It did not become a debt due by the Companies to the Sassoons and it could not therefore be said to have accrued to them. The contract of employment was an entire and an indivisible contract and the remuneration payable by the Companies to the Sassoons thereunder was payable at stated periods. It was a condition precedent to the Sassoons earning the remuneration that they fulfilled the terms of their

employment, completed the period for which the remuneration was payable to them and the service for the particular period was a condition precedent to their earning the remuneration for that period. The stated period was that of a year and no remuneration was payable to the Sassoons till the end of the year and unless and until they completed the period of the year they would not be entitled to any commission or remuneration for the year, much less for the broken period. It was therefore contended that the Sassoons had not earned any commission for the broken periods and that not having earned the same they could not have assigned it to the transferees with the result that when the transferees were paid the commission under the terms of the Managing Agency Agreements, the transferees received the same in their own right even though they had not rendered the services to the Company for the whole of the calendar year 1943. It was contended that in any event, whatever be the position as between the Companies and the transferees the Sassoons had not earned any part of the Managing Agency commission which had been paid by the Companies to the transferees and were not liable to tax in respect of the same.

It was on the other hand urged on behalf of the transferees that even though under the terms of the deeds of assignment and transfer they were paid by the companies the whole of the Managing Agency commission for the calendar year 1943, they had merely earned the commission or remuneration for the period of actual services rendered by them to the Company and the portions of the Managing Agency commission proportionate to the services actually rendered by the Sassoons to the Companies had accrued to the Sassoons though it had been ascertained and paid to the transferees in the year 1944. Even though the ascertainment and the payment came later it made no difference to the accrual of the income which could be referred back to the period during which the income was earned and accordingly whatever amount was earned by the Sassoons during the respective periods that they had acted as the Managing Agents of the Companies had accrued to them during those periods and was received by the transferees only by virtue of the respective deeds of assignment and transfer. Having been received by the transferees by virtue of the assignments those portions of the Managing Agency commission received by them nonetheless constituted income which had accrued to the Sassoons and were liable to tax against the Sassoons the assignors and not against them the assignees.

The position of an employee under an entire contract of service has been thus enunciated in Halsbury's Laws of England—Hailsham Edition—Volume 22, page 133, para. 221 —

When the contract of service is an entire contract providing for payment on the completion of a definite period of service, or of a definite piece of work it is a condition precedent to the recovery of any salary or wages in respect thereof that the service or duty shall be completely performed unless the employer so alters the contract as to entitle the servant to regard it at an end in which case the whole sum payable under the contract becomes due or unless there is a usage that the servant is entitled to wages in proportion to the time actually served. But when the contract though in respect of work terminating at a particular time is to be construed as providing that remuneration shall accrue due and become vested at stated periods such remuneration constitutes a debt recoverable at the end of each such period of service.

Section 219 of the Indian Contract Act also provides that in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act.

Our attention was drawn in this connection to the case of *Boston Deep Sea Fishing and Ice Co v Ansell*¹. In that case the defendant was employed as the managing director of the company for 5 years at a yearly salary. He was dismissed for misconduct before the expiration of the current year and claimed against the company damages for wrongful dismissal and the salary for the quarter which had expired before his dismissal. His claim for salary was disallowed and it was held that having been dismissed for misconduct he was not entitled to any part of the unpaid salary for the current year of his service. Lord Justice Cotton at page 360 posed the question as under —

Can he sue for a proportionate part of the salary for the current year? What he would have been entitled to if he continued in their service until the end of the year would have been £800, but in my opinion that would give him no right of action until the year was completed.

Lord Justice Bowen observed at page 364 —

As regards his current salary it is clear and established beyond all doubt by authorities that the servant who is dismissed for wrongful behaviour cannot recover his current salary that is to say, he cannot recover salary which is not due and payable at the time of his dismissal but which is only to accrue due and become payable at some later date and on the condition that he had fulfilled his duty as a faithful servant down to that later date.

The case of *Moriarty v Regents Garage & Engineering Company, Ltd*², was particularly relied upon by the learned counsel for the Sassoons. No question of dismissal or removal for misconduct arose in that case, but the director whose remuneration was fixed "at the rate of £150 per annum" ceased to be a director on settlement of disputes between himself and the company, the director agreeing to accept payment of all money due to him upon his debentures and the debentures being paid off in the middle of the year. The director sued the company to recover a proportionate part of the £150 as his fees for the broken period. The Deputy County Court Judge gave judgment for the company, holding that the director was not entitled to remuneration for a broken part of a year. The Divisional Court reversed the decision of the Deputy County Court Judge and there was a further appeal. It was held by the Court of Appeal that neither under the agreement nor under the articles was the director entitled to the sum he claimed. The question of the applicability of the Apportionment Act was sought to be raised before the Appeal Court but was not allowed to be raised in appeal as it had not been done in the County Court. In arriving at this decision Lord Sterndale, M. R. stated the position as follows at page 774 —

It seems to me that upon the construction of the agreement it must fail. It is a payment per annum, a payment for a year, and unless he serves for the year he cannot get the payment. The decision in *Suabey v Port Darwin Gold Mining Co*³, had been cited before the Court of Appeal in support of the proposition that the director was in such cases entitled to his proportionate remuneration for the broken period. The learned Master of the Rolls, however, observed at page 777 —

There is nothing in *Suabey v Port Darwin Gold Mining Co*³ in my opinion to oblige us to hold that wherever there is power, mutual or one-sided, to terminate an agreement in the middle of the year there must as a matter of necessity, be inferred a right to receive payment from day to day, and receive payment for the broken period. I do not think in this case there are circumstances which oblige me or induce me to draw that inference.

These authorities as well as the cases of *Mappleston v Sears*⁴, and *Sanders v Whittle*⁵, enunciate the well established principle that wages and salaries are not apportionable.

1 (1883) L.R. 39 Ch. D. 339

2 L.R. (1921) 2 K.B. 166

3 (1889) 1 Meg. 385

4 (1911) 28 T.L.R. 30

5 33 L.T. 816

upon the sudden cessation of a contract of service, which is stated to be still the law in Batt on the Law of Master and Servant, 4th edition, at page 209, until a hardy litigant successfully seeks in a higher Court a confirmation of the view of McCardie, J., expressed in *Moriarty's case*¹, as regards the injustice of denying the benefit of the Apportionment Act to a man who may have been guilty of misconduct. This rule applies not only when there is a sudden cessation of a contract of service by the unilateral act of the master or the servant but also when there is such cessation by mutual consent of the parties. In the former event the servant would be deprived of his proportionate wages by his own act or default or he would be able to sue his master for damages for wrongful dismissal but no claim for proportionate salary or wages would survive under the contract of service. In the latter event the consensus of opinion between the master and the servant would be sufficient to terminate the contract of service and no claim for proportionate wages or salary would survive unless it was made an express term of the agreement thus arrived at between the parties. In either event there would be no question of the servant claiming from his master wages or salary for the broken period.

Learned counsel for the transferees attempted to throw doubt on the correctness of the rule as enunciated above by citing a passage from Palmer's Company Precedents, 16th edition volume 1, page 583, where the learned author discusses the question of apportionment in the case of director's remuneration payable at so much per annum —

Where the clause provides that a director is to be paid so much per annum the words 'at the rate of' being omitted and he vacates office before the end of a current year, the question whether he can maintain a claim for an apportioned part of the remuneration for that year has given rise to some difference of opinion. In *Swabey v Port Darwin Gold Mining Co*², in the Court of Appeal, the article was as follows and not as stated in the report: 'The directors shall each receive by way of remuneration out of the funds of the company in each year the sum of £200, and the chairman in addition £100 per annum. The words 'at the rate of' were not present (as appears from the articles registered at Somerset House). A director resigned in the course of a current year and was held entitled to an apportioned part of the remuneration for that year.

But in *Salton v New Beeston Cycle Co*³, where the article provided that the directors shall be entitled to receive by way of remuneration in each year £5 000⁴, Cozens Hardy, J., held that a director who vacated office before the end of a current year was not entitled to any apportionment. This case was followed by Wright J. in *McConnell's Claim*⁵, the words being 'each director shall be paid the sum of £300 per annum' and by Bruce J. in *Inman v Acroyd and Bert*⁶ on appeal⁷. See also *Central de Kaap Gold Mines*⁸ (Wright J.). In these four cases the Court no doubt proceeded on the assumption that the report of *Swabey's case*² was correct and that the article in that case contained the words 'at the rate of'. Certainly Lord Alverstone C.J., acted on this assumption in *Harrison v Bristish Microscope etc Co*⁹. There the words were 'the sum of £1 500 per annum'. In the meantime *Inman v Acroyd and Bert*⁶ had been taken to the Court of Appeal⁷, and affirmed but on the ground that it was by the articles left to the directors to apportion the remuneration at the end of each year.

This case therefore really turned on the construction of the particular articles and as it was carefully distinguished from *Swabey's case*², the authority of that case, on an article omitting the words 'at the rate of' remains unshaken.

*Swabey's case*² was referred to by Lord Sturndale, M.R., at page 777 in *Moriarty's case*¹ and the learned M.R. stated that there was nothing in that case which would

1 L.R. (1921) 2 K.B. 766

2 (1889) 1 Meg. 38.

3 L.R. (1898) 1 Ch. 775

4 L.R. (1901) 1 Ch. 728

5 (1900) 82 L.T. 621

6 L.R. (1901) 1 Q.B. 613

7 (1899) W.N. 216, 235, 69 L.J. Ch. 18

8 (Times, Nov. 10, 1903, p. 3)

oblige the Court to hold that wherever there was power, mutual or onesided to terminate an agreement in the middle of the year there must, as a matter of necessity, be inferred a right to receive payment from day to day and receive payment for the broken period. It really depended on the circumstances of each case whether to draw that inference or not. In any event we have not before us under the terms of the managing agency agreements any provision for payment of remuneration at the rate of any particular sum a year and the ratio of the four cases referred to by Palmer in the passage quoted above as also the observations of Lord Sterndale, M R at page 777 in *Morarty's case*¹ set out above are sufficient to enable us to hold that when the remuneration or commission is expressed at so much per annum without anything more it would amount in law to a stipulation for the payment of remuneration per year and the servant would not be entitled to get any remuneration unless and until he has completely performed his contract and such performance would be a condition precedent to the recovery of any wages or salary for that definite period of service. That would be the position even if the remuneration was to accrue due and becomes vested at stated periods and unless the servant performed the condition and fulfilled his duty as a faithful servant down to that stipulated date or the stated period no salary would accrue due and become payable to him until at the end of such period of service.

We shall now examine the terms of the Managing Agency Agreements with a view to see whether the Sassoons were entitled thereunder to remuneration or commission for the broken periods. The Agreement between the E D Sassoon United Mills Ltd and the Managing Agents was for a fixed period of 30 years from the date of the registration of the Company and thereafter until they resigned or were removed from their office by a special resolution of the Company and the appointment of the firm of E D Sassoon & Co and their assigns was for the whole period. E D Sassoon & Co and their assigns covenanted and agreed with the Company to be and act as such Agents for the remuneration and upon and subject to the terms and conditions therein contained. It was lawful for them to assign the Agreement and their rights thereunder to any person firm or company having authority by its constitution to become bound by these obligations and upon such assignment being made and notified to the Company the Company was bound to recognise such person firm or company as the Agents of the Company in like manner as if the name of such person firm or company had appeared in these presents in lieu of the names of the partners of E D Sassoon & Company and as if such person firm or company had entered into the Agreement with the Company and the Company agreed upon demand to enter into an agreement appointing such person firm or company the Agents of the Company for the then residue of the term outstanding under the Agreement and with the like powers and authorities remuneration and emoluments and subject to the like terms and conditions as therein contained. These provisions of the Agreement showed the continuity of the Managing Agents who were employed as the Agents of the Company for this specified period and under the terms and conditions therein recorded. The new or the substituted Managing Agents were treated as if they had entered into the Agreement with the Company and their name had appeared in the original agreement in lieu of E D Sassoon & Co who were in the first instance appointed the Agents of the Company. These

Managing Agents described as such were to be paid the remuneration specified in clause 2 (a) of the Agreement which was a commission of $7\frac{1}{2}$ per cent per annum on the annual net profits of the Company with a stipulation in regard to the minimum remuneration of Rs 1,20,000 per annum. Clause 2 (d) specified when the said commission was to become due to the Managing Agents and it provided that the commission was to be due to them yearly on the 31st March in each and every year during the continuance of the Agreement. The commission was thus an annual payment calculated upon the annual net profits of the Company and was to be due to the Managing Agents yearly on the 31st March in each and every year. Unless and until the annual net profits of the Company were determined the $7\frac{1}{2}$ per cent commission could not be ascertained but the sum nonetheless became due on the 31st March in each and every year following the close of the accounting year of the Company. The amount of such commission did not become a debt owing by the Company to the Managing Agents until the 31st March in each and every year and was to be paid immediately after the annual accounts of the Company had been passed by the shareholders. The postponement of the date of payment in this manner however did not prevent the amount of the commission thus ascertained becoming due to the Managing Agents and it was on the 31st March in each and every year that the amount of commission thus calculated at $7\frac{1}{2}$ per cent per annum on the annual net profits of the Company became due by the Company to the Managing Agents. Until and unless the accounting year of the Company had gone by and the Managing Agents have served the Company as their Agents for the full period no part of the Managing Agency commission which was payable per year in the manner aforesaid could become due to them and the performance of the service for the year was a condition precedent to the Managing Agents being entitled to any part of the remuneration, or commission for the accounting year of the Company. The Managing Agency Agreement therefore was an entire and indivisible contract stipulating a payment of remuneration or commission per year and enjoined upon the Managing Agents the duty and obligation of rendering the services to the Company for the whole year by way of condition precedent to their earning any remuneration or commission for the particular accounting year.

It was however urged that clause 10 of the Managing Agency Agreement itself contemplated a broken period, because there was nothing therein to prevent the Managing Agents from assigning the Agreement and their rights thereunder *at any time in a particular year during the continuance of the Agreement*. If the Managing Agents therefore could assign the Agreement and their rights thereunder it could not be suggested that neither the transferors who could not complete the year of service nor the transferees who had also not rendered the services as the Managing Agents for the whole of the accounting year could earn any remuneration or commission which would be payable to the Managing Agents only if they rendered the services to the Company for the whole year. It therefore followed as a necessary corollary that both the transferors and the transferees would be paid their remuneration or commission and both would be entitled to the proportionate commission for the respective periods during which they rendered services as Managing Agents to the Company. This argument however ignores the fact that whatever be the position as between the transferor and the transferee, whatever be their arrangements *inter se*, whatever be the periods of the year during which they might

have served the Company in their capacity as the Managing Agents, the Managing Agents as described in the recitals and clauses 1 and 3 of the Managing Agency Agreement were one entity and no severance of such periods of service during the course of a particular year was ever contemplated under the Agreement. On assignment, the transferee became the Managing Agents as if its name had been inserted in the Managing Agency Agreement from the beginning. For the future period the transferor effaced itself and the transferee took the place of the transferor and preserved the continuity of the Managing Agency so that whoever happened to satisfy the description of the Managing Agents at the time when the commission for the accounting year became due to the Managing Agents thus described, which was expressly stated to be due yearly on the 31st March in each and every year, became entitled to receive the debt which thus became due and to the payment thereof after the annual accounts of the Company had been passed by the shareholders. The stipulation for the Company executing in favour of the new or the substituted Managing Agents an agreement appointing them the Agents of the Company for the then residue of the term outstanding under the Agreement was merely consequential upon the earlier provision therein contained which stated in so many terms that the Company was bound to recognise such new or substituted Managing Agents in like manner as if their names had appeared in the said Agreement in lieu of the partners of E. D. Sassoon & Co. and as if they had entered into the Agreement with the Company. The rights of such new or substituted Agents were created by the very terms of clause 10 of the Agreement and the formal embodiment thereof in the fresh agreement to be entered into by the Company with them merely confirmed the rights which had already been created in them under that clause.

It was further pointed out that at the end of the Managing Agency Agreement if not earlier during the continuance thereof there would certainly be a broken period because the period of 30 years stipulated in clause 1 of the Agreement would certainly expire on some date in February, 1950. The calendar year would expire on the 31st December, 1949 and there would of necessity be between the date of the expiration of the calendar year and the date of the expiration of the term of the agreement a period of about 2 months which would certainly be a broken period and not a full year. What would happen however on the expiration of the period of the Managing Agency Agreement cannot affect the construction of the relevant terms of the Agreement which have reference to a year or years during the continuance of the Agreement. It is unnecessary to speculate as to whether by reason of the fact that D. E. Sassoon & Co. must have received the full year's remuneration or commission at the end of the first accounting year of the Company ending with the 31st December, 1920, they might just as well give up if need be, their remuneration or commission for the last two months on the expiration of the term of the Managing Agency Agreement. We see nothing in the terms of the Managing Agency Agreement which would compel or induce us to hold that there must as a matter of necessity be inferred therefrom a right to receive remuneration or commission for a broken period.

Learned counsel for Chudambaram Mulraj & Co., Ltd., however, sought to distinguish the terms of the Managing Agency Agreement of the Elphinstone S. & W. Co., Ltd., from those of the Managing Agency Agreement of the E. D. Sassoon United Mills, Co., Ltd., even though as stated before no such distinction was made

either before the income tax authorities or the High Court. He contended that there was nothing in the Agency Agreement with the Elphinstone S. & W. Co., Ltd., which corresponded with clauses 2 (a), 2 (d) and clause 10 of the Agreement between the E. D. Sassoon United Mills and their Managing Agents. The only term which was to be found in the Agency Agreement of the Elphinstone S. & W. Co., Ltd., was that the Company was during the continuance of the Agreement to pay to the Managing Agents who were there described as E. D. Sassoon & Co., Ltd., their successors and their assigns by way of remuneration a commission of ten per cent on the net profits of the Company and a further sum of Rs. 1,500 per month. There was besides clause 6 of the Agreement which conferred upon the Managing Agents the right of retainer, and reimbursement in connection *inter alia* with all sums due to them for commission or otherwise. These terms it was submitted did not constitute the payment of remuneration or commission a payment per annum and it was not possible to argue that the Sassoons were not entitled to any remuneration or commission for a broken period thereunder.

It may however be observed that the Managing Agency Agreement with which we are here concerned was the Agreement, dated the 23rd May, 1922, between the Company and the Sassoons and the Managing Agents there described were E. D. Sassoon & Co., Ltd. on behalf of themselves, their successors and assigns clause 1 of the Agreement employed the Sassoons, their successors and assigns the Agents of the Company from the 1st February, 1922, for the unexpired portion of the term of 60 years commencing from the 3rd July, 1919 and it was these Managing Agents thus described, viz., the Sassoons, their successors and assigns who were during the continuance of the Agreement to be remunerated by a commission of 10 per cent on the net profits the Company and the Company agreed to pay such commission to them. The right of retainer and reimbursement reserved under clause 6 of the Agreement would not carry the transferees any further because it was in respect of all sums due to them for commission or otherwise. Unless and until the commission became due to them they had no such right of retainer. It would still have to be determined whether any sum became due to them by way of such commission. Whether any commission became due to them would depend upon the construction of clause 3 of the Agreement and under that clause the commission calculated at 10 per cent of the net profits of the Company was to become due to them and was to be paid by the Company to them during the continuance of the Agreement. We have got to determine what is the full implication of this clause of the Agreement,— the commission of 10 per cent on the net profits of the Company". The word 'profits' has a well-defined legal meaning as was observed by Lord Justice Fletcher Moulton at page 98 in *The Spanish Prospecting Company, Ltd.*¹

The word 'profits' has in my opinion a well-defined legal meaning and this meaning coincides with the fundamental conception of profits in general parlance although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. Profits implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.

This concept of the term was also adopted by Mr. Justice Mahajan as he then was in *Commissioner of Income Tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay*²

1 L.R. (1911) 1 Ch. D. 92

2 (1949) 18 I.T.R. 472 at 502 (1950,

SCJ 374 (1950) S.C.R. 335 (S.C.)

" Profits of a trade or business are what is gained by the business. The term implies a comparison between the state of business at two specific dates separated by an interval of an year and the fundamental meaning is the amount of gain made by the business during the year and can only be ascertained by a comparison of the assets of the business at the two dates the increase shown at a later date compared to the earlier date represents the profits of the business "

It was urged before us that there was nothing in the terms of the Agreement which provided that the profits were to be ascertained at the end of every year, and there was nothing to prevent the Company, if it so chose from casting its accounts and ascertaining the net profits half-yearly or quarterly or even every month by preparing trial balance-sheets in that manner. Theoretically speaking all this may be possible but we have got to construe the Agreements arrived at between business people in a business sense. Ordinarily in the case of business or trading concerns accounts of profits are not made except at stated intervals usually separated by a year. Particularly in the case of limited companies incorporated under the Indian Companies Act the accounts are cast every year and the net profits earned by the company are ascertained every year both for the declaration of dividends and for submitting the returns to the income tax authorities. Under section 131 (1) of the Indian Companies Act of 1913 every company was required once at least in every year and at intervals of not more than 15 months to cause the accounts to be balanced and a balance-sheet to be prepared which was called the annual balance sheet. The first schedule to the Companies Act which contained the regulations by which unless excluded the affairs of the company were to be governed provided under Regulation 106 the preparation once at least every year of the profit and loss account for the period and under the Regulation 108 for the balance sheet to be made out in every year and laid before the company in general meeting. Having regard to the course of business which prevailed in this Company also so far as it is evidenced by the fact that the account of the Managing Agency Commission was made up for the calendar year 1943 and was paid to Chidambaram Mulraj & Co, Ltd, who became the Managing Agents in place and stead of the Sassoons in the year 1944, it is reasonable to assume that the accounts of this Company were throughout made up at the end of every calendar year. The profit and loss of the Company was then ascertained and a commission of 10 per cent on the net profits of the Company was paid to the Managing Agents of the Company for the time being. In the case of limited companies like those before us we would be justified in presuming that normally the accounts are made up every year and even though there may be a theoretical possibility of the accounts being cast half-yearly or quarterly or even every month no such procedure would be adopted by the Company. In any event it would be absurd to suggest that the profits of the Company could accrue from day to day or even from month to month. The working of the Company from day to day could certainly not indicate any profits or loss. Even the working of the Company from month to month could not be taken as a reliable guide for this purpose. If the profit or loss has got to be ascertained by a comparison of the assets at two stated periods, the most business-like way of doing it would be to do so at stated intervals of one year and that would be a reasonable period to be adopted for the purpose. In the case of large business concerns like these the working of the company during a particular month may show profits and the working in a particular month may show loss. The working during the earlier part of the year may show profit or loss and working in the later part of the year

may show loss or profit which would go to counter-balance the profit or loss as the case may be in the earlier part of the year. It may as well happen that the profits which the company may appear to have earned during the earlier months of the year or even during the 11 months of the year may be considerably reduced or even wiped out during the later months or the last month of the year by reason of some catastrophe or unforeseen events. It would be therefore reasonable to assume that the profit or loss as the case may be should be determined at the end of every year so that on such calculation of net profits the Managing Agents may be paid their remuneration or commission at the percentage stipulated in the Managing Agency Agreement and the shareholders also be paid dividends out of the net profits of the company. We are sure that these were the considerations which weighed with the Managing Agents of this Company in not taking up any such contention before the income-tax authorities and the High Court that the remuneration or commission payable to them under the Managing Agency Agreement was not payable per year and the contention put forward before us in this behalf was a clear after-thought. We would be therefore justified in treating the terms and conditions in regard to the payment of Managing Agency commission in both these Managing Agency Agreements as on a par with each other stipulating for such payment per year on the net annual profits of the Companies.

If this be the true construction of the Managing Agency Agreements it follows that the contract of service between the Companies and the Managing Agents was entire and indivisible, that the remuneration or commission became due by the Companies to the Managing Agents only on completion of a definite period of service and at stated periods, that it was a condition precedent to the recovery of any wages or salary in respect thereof that the service or duty should be completely performed, that such remuneration constituted a debt only at the end of each such period of service and that no remuneration or commission was payable to the Managing Agents for broken periods.

The question still remains whether the remuneration for the broken periods accrued to the Sassoons and the contention which was strenuously urged before us on behalf of the transferees was that the Sassoons had rendered the services in terms of the Managing Agency Agreements to the respective Companies, that the services thus rendered were the source of income and whatever income could be attributed to those services was earned by the Sassoons and accrued to them in the chargeable accounting period though it was ascertained and paid in the year 1944 to the transferees.

The word 'earned' has not been used in section 4 of the Income tax Act. The section talks of "income, profits and gains" from whatever source derived which (a) are received by or on behalf of the assessee, or (b) accrue or arise to the assessee in the taxable territories during the chargeable accounting period. Neither the word "income" nor the words "is received", "accrues" and "arises" have been defined in the Act. The Privy Council in *Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.*¹ attempted a definition of the term "income" in the words following —

'Income', their Lordships think, in the Indian Income tax Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity from definite sources. The

¹ (1932) 63 M.L.J. 124 L.R. 59 I.A. 206 I.L.R. 59 Cal. 1343 at 1352 (P.C.)

source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall."

Mukherji, J., has defined these terms in *Rogers Pyatt Shellac & Co v Secretary of State for India*¹

Now what is income? The term is nowhere defined in the Act. In the absence of a statutory definition we must take its ordinary dictionary meaning—that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money—annual or periodical receipts accruing to a person or corporation (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. Accrues, arises and is received are three distinct terms. So far as receiving of income is concerned there can be no difficulty. It conveys a clear and definite meaning and I can think of no expression which makes its meaning plainer than the word receiving itself. The words accrue and arise also are not defined in the Act. The ordinary dictionary meanings of these words have not to be taken as the meanings attaching to them. Accruing is synonymous with arising in the sense of springing as a natural growth or result. The three expressions accrues, arises and is received having been used in the section strictly speaking accrues should not be taken as synonymous with arises but in the distinct sense of growing up by way of addition or increase or as an accession or advantage while the word arises means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar and the difference only lies in that one is more appropriate than the other when applied to particular cases. It is clear however as pointed out by Fry L.J., in *Colquhoun v Brooks*² [this part of the decision not having been affected by the reversal of the decision by the House of Lords³] that both the words are used in contradistinction to the word receive and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.

One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called income.

The observations of Lord Justice Fry quoted above by Mukherji, J., were made in *Colquhoun v Brooks*² while construing the provisions of 16 and 17 Victoria, chapter 34 section 2, schedule 'D'. The words to be construed there were 'profits or gains arising or accruing' and it was observed by Lord Justice Fry at page 59—

In the first place I would observe that the tax is in respect of profits or gains arising or accruing. I cannot read those words as meaning received by. If the enactment were limited to profits and gains received by the person to be charged that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no income tax would be payable upon profits which accrued but which were not actually received although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore that the words arising or accruing are general words descriptive of all that is received as profits.

To the same effect are the observations of Satyanarayana Rao J., in *Commissioner of Income Tax Madras v Anamallais Timber Trust Ltd*⁴ and Mukherjea, J., in *Commissioner of Income Tax, Bombay v Ahmedbhai Umarbhai & Co Bombay*⁵ where this passage from the judgment of Mukherji, J., in *Re Rogers Pyatt Shellac & Co v Secy of State for India*⁶, is approved and adopted. It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired

1 (1924) 1 ITC 363 at 371

2 (1888) L.R. 21 Q.B.D. 52 at 59

3 (1889) L.R. 14 A.C. 493

4 (1949) 18 ITR 333 at 342

5 (1950) SCJ 374 18 ITR 472 (1950) SCR 335 at 389 (SC)

6 (1924) 1 ITC 363 (37)

a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in presenti, solvendum in futuro*, see *W S Try, Ltd v Johnson (Inspector of Taxes)*¹ and *Webb v Stenton and others, Garmshees*². Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.

The word earned even though it does not appear in section 4 of the Act has been very often used in the course of the judgments by learned Judges both in the High Courts as well as the Supreme Court. (Vide *Commissioner of Income-Tax, Bombay v Ahmedbhai Umarbhai & Co, Bombay*³ and *Commissioner, Income-tax, Madras v K R M T T Thangaraja Chetty & Co*⁴. It has also been used by the Judicial Committee of the Privy Council in *Commissioners of Taxation v Kirk*⁵. The concept however cannot be divorced from that of income accruing to the assessee. If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a *debitum in presenti, solvendum in futuro* it cannot be said that any income has accrued to him. The mere expression 'earned' in the sense of rendering the services, etc., by itself is of no avail.

If therefore on the construction of the Managing Agency Agreements we cannot come to the conclusion that the Sassoons had created any debt in their favour or had acquired a right to receive the payments from the Companies as at the date of the transfers of the Managing Agencies in favour of the transferees no income can be said to have accrued to them. They had no doubt rendered services as Managing Agents of the Companies for the broken periods. But unless and until they completed their performance, i.e., the completion of the definite period of service of a year which was a condition precedent to their being entitled to receive the remuneration or commission stipulated thereunder no debt payable by the Companies was created in their favour and they had no right to receive any payment from the Companies. No remuneration or commission could therefore be said to have accrued to them at the dates of the respective transfers.

It was however urged that even though no income can be said to have accrued to the Sassoons at the date of the respective transfers which could be the subject-matter of any assignment by them in favour of the transferees, the moment the remuneration or commission was ascertained at the end of the calendar year and became a debt due to the Managing Agents under the terms of the Managing Agency Agreements it could be referred back to the period in which it was earned and the portions of the remuneration or commission which were earned by the Sassoons during the broken period could certainly then be said to be the income which had accrued to them during the chargeable accounting period.

¹ (1916) 1 A E R. 332 at 333.

² (1883) 11 Q B D 548 at 522 and 527.

1950 S C J 374 18 I T R 472 1950

S C R 335 at 364 (S C.).

⁴ (1953) 24 I T R 575 at 533

⁵ (1900) A C 588 at 592

Reliance was placed in support of this position on *Commissioners of Inland Revenue v Gardner Mountain & D'Ambrumel, Ltd*¹. The assessee in that case carried on *inter alia* the business of underwriting agents, and entered into agreements with certain underwriters at Lloyds under which it was entitled to receive as remuneration for its services in conducting the agency, commissions on the net profits of each year's underwriting. The agreements provided, that "accounts should be kept for the period ending 31st December, in each year and that each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the Company shall be calculated and paid thereon". The accounts for the underwriting done in the calendar year 1936 were made up at the end of 1938 and the question that arose was whether the assessee was liable to additional assessment in respect of the commission on underwriters' profits from the policies underwritten in the calendar year 1936 in the year in which the policies were underwritten or in the year when the accounts were thus made up. The assessee contended that the contracts into which it entered were executory contracts, under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account, that the profit in the form of commission was not ascertainable or earned, and did not arise, until that time and that the additional assessment which was made in the year in which the policies were underwritten should accordingly be discharged. The Special Commissioner allowed the assessee's contention and discharged the additional assessment. The decision of the Special Commissioner was confirmed on appeal by Macnaghten J, in the King's Bench Division of the High Court. The Court of Appeal however reversed this decision and a further appeal was taken by the assessee to the House of Lords. The House of Lords held that on the true construction of the agreements, the commissions in question were earned by the assessee in the year in which the policies were underwritten, and must be brought into account accordingly and confirmed the decision of the Court of Appeal. It may be noted that the charge was on profits arising in each chargeable accounting period and the profits were to be taken to be the actual profits arising in the chargeable accounting period. The ratio of the decision was that the commission paid was remuneration for services completely performed in the particular year, that the assessee had at the end of the year done everything it had to do to earn it and that it was remuneration for work done and completely done in the particular year though it was ascertained and paid two years later. Viscount Simon in his speech at page 93 stated that the assessee had acquired a legal right to be paid *in futuro* and that the principle was to refer back to the year in which it was earned so far as possible remuneration subsequently received even though it could only be precisely calculated afterwards. Lord Wright in his speech at page 94 said that it was necessary to determine in what year the commission was earned, or in the language of the Act, in what year the assessee's profits arose and observed at page 96 —

¹ I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned though the profits resulting from the insurance

cannot be then ascertained but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested though its valuation is postponed and is not merely postponed but depends on all the contingencies which are inevitable in any insurance risk losses which may or may not happen returns of premium premiums to be arranged for additional risks, re insurance and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case however they may affect the profit, do not affect the right for what it eventually proves to be worth.

Lord Simonds in his speech at page 110 stated —

It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so I should have thought that it was not arguable that that commission did not accrue for Income-tax purposes in that same year though it was not ascertainable until later."

The fact that the account of the commission could not be made up until later did not make any difference to the position that the commission had been wholly earned during the chargeable accounting period and the income had accrued to the assessee during that period.

Learned counsel for the transferees also relied upon the decisions in *Bangalore Woollen Cotton and Silk Mills Co., Ltd v Commissioner of Income tax, Madras*¹ and *Turner Morrison & Co Ltd v Commissioner of Income-Tax, West Bengal*², to show that as and when the sale proceeds were received by the Company the profits made by the Company were embedded in those sale proceeds and if that was so the percentage of the net profits which was payable by the Companies to the Managing Agents as and by way of commission was similarly embedded in those sale proceeds. If the profits thus accrued to the Company during the chargeable accounting period the commission payable to the Managing Agents also could be said to have accrued to them during that period.

It is no doubt true that the accrual of income does not depend upon its ascertainment or the accounts cast by assessee. The accounts may be made up at a much later date. That depends upon the convenience of the assessee and also upon the exigencies of the situation. The amount of the income, profits or gains may thus be ascertained later on the accounts being made up. But when the accounts are thus made up the income, profits or gains ascertained as the result of the account are referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that chargeable accounting period. "The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual."

"The quantification of the commission is not a condition precedent to its accrual" (Per Ghulam Hassan, J, in *Commissioner of Income-tax, Madras v K R M T T Thiragaraya Chetty & Co*³. See also *Isaac Holden & Sons, Ltd v The Commissioners of Inland Revenue*⁴, and *Commissioners of Inland Revenue v Newcastle Breweries, Ltd*⁵. What has however got to be determined is whether the income, profits or gains accrued to the assessee and in order that the same may accrue to him it is necessary that he must have acquired a right to receive the same or that a right to the income, profits or gains has become vested in him though its valuation may be postponed or though its materialisation may depend on the contingency that the making up of the accounts would show income, profits or

1 (1950) 18 ITR 423

2 (1953) 23 ITR 152

3 (1954) 24 ITR 525 at 534

4 (1924) 12 Tax Cases 768

5 (1925) 12 Tax Cases 927

gains. The argument that the income, profits or gains are embedded in the sale proceeds as and when received by the Company also does not help the transferees, because the Managing Agents have no share or interest in the sale proceeds received as such. They are not co-sharers with the Company and no part of the sale proceeds belongs to them. Nor is there any ground for saying that the Company are the trustees for the business or any of the assets for the Managing Agents. The Managing Agents cannot therefore be said to have acquired a right to receive any commission unless and until the accounts are made up at the end of the year, the net profits ascertained and the amount of commission due by the Company to the Managing Agents thus determined. See *Commissioners of Inland Revenue v Lebus*¹.

It is clear therefore that no part of the Managing Agency Commission had accrued to the Sassoons at the dates of the respective transfers of the Agencies to the transferees.

The two decisions which were sought to be distinguished by the High Court in the judgments under appeal also support this conclusion. In the unreported decision of the High Court of Bombay in the *Commissioner of Excess Profits Tax, Bombay City v Messrs P N Mehta & Sons*² the Managing Agency Agreement was couched in the very same terms as that of the E D Sassoon United Mills Co., Ltd. The Managing Agents were to be paid 10 per cent of the net annual profits made by the Company with a guaranteed minimum commission of Rs. 15,000 per annum. The accounting year of the company was the calendar year. The Tribunal had held that the annual profits could only be ascertained when the accounts of the Company were made up and it was then that the 10 per cent commission would accrue to the Managing Agents. The contention of the Department was that as the Managing Agents worked as such from day to day and helped the Company to earn profits, profits accrued to them from day to day and not at the end of the year. This contention was negatived by the High Court —

It is only on the net annual profits that the Managing Agents are entitled to any commission. A company may have worked for six months at a loss for the remaining six months it may make a large profit so as to wipe off the loss and have a net profit to show. It is only as a result of the working of the Mills for the whole year that it will be possible to ascertain whether the Mills have worked at a loss or at a profit and what the profit is. Therefore the Managing Agents are only entitled to a commission on the result of the working of the Mills for a whole year. If the working shows a net annual profit which gives them a commission of Rs. 15,000 on the basis of 10 per cent they are entitled to that amount. On the other hand if the working does not show a profit which entitles them to a commission of Rs. 15,000 then they are not entitled to that amount. Therefore in our opinion on the Tribunal's right held that the accrual of the commission was at the end of the calendar year which was the year ascertained by the Mills and not from time to time as contended by the Department.

In the case of *Salt and Industries Agencies, Ltd. Bombay v Commissioner of Income Tax, Bombay City*³, the question for the consideration of the Court no doubt was what was the place where the profits had accrued. In determining the place where the profits had accrued it was however necessary to find when the profits had accrued to the assessee and it was held that what was conclusive of the matter was the consideration as to when the right to Managing Agency commission arose and when did the company become liable to pay Managing Agency commission to the Managing

1 (1946) 1 A.E.R. 476 S.C. 27 Tax Cases

2 (1950) Income tax Reference No. 19 of 1950

3 (1949) 18 I.T.R. 58

ing Agents and it was further held that it was only when all the accounts of the working of the company were submitted to the head office in Bombay and the profit was determined that it could be said that a right to receive a commission at the rate specified in the Managing Agency Agreement had arisen and the Managing Agents became entitled to a certain specified commission. These considerations are germane to the question which we have to decide in these appeals and support the conclusion which we have already arrived at, that the right to receive the commission would arise and the income, profits or gains would accrue to the Managing Agents only at the end of the calendar year which was the *terminus a quo* for the making up of the accounts and ascertaining the net profits earned by the Company. We fail to see how these cases which were relied upon by the Revenue before the High Court could be distinguished in the manner in which it was done.

We were invited by the learned counsel for the Sassoons to approach the question from another point of view and that was that what had been transferred by the Sassoons to the transferees was a source of income, viz., the Managing Agency which was to run for the unexpired residue of the term. It was urged that where a source of income was transferred any income which accrued from that source after the date of the transfer was the transferees' income and not of the transferors, and that it was immaterial (a) that at the date of the transfer there was an expectation that at a future date income would accrue, (b) that the transferor by the work before the transfer had contributed to create any income which might eventually accrue and (c) that because of the expectation of income a higher price had been paid for the transfer.

Reliance was placed in this connection on the case of the *Th. Commissioners of Inland Revenue v. Forrest*¹. In that case the assessee purchased certain shares on the 25th November, 1919 and paid an excess price "to cover the portion of the dividend accrued to date". A dividend of 10 per cent for the period ending on 28th February 1920, was declared on the 13th May, 1920. The contention of the assessee was that the dividend should be treated as capital in view of the terms of the contract of purchase and not included in the computation of his income. Under the provisions of the Income Tax Act the dividends which were receivable by him were required to be included in the computation of his income. The learned Judges however discussed the legal effect of such a transaction of the purchase of shares. Lord Ormrod observed at page 709 —

The value of the shares had to be determined as a matter of bargain between the parties and the purchaser thought that it was not unreasonable that he should pay something over par for them because of the possibility not the certainty but the possibility, of a dividend six months afterwards being paid upon the shares so purchased by him.

Lord Anderson observed at page 710 —

He buys two things with his money. He buys in the first place a share of the assets of the industrial concern proportionate to the number of shares which he has purchased, and he also buys the right to participate in any profits which the Company may make in the future. Now, when a transaction of this nature is entered into during the currency of the financial year of the industrial concern it is obvious that what happens is this: that not only is a part of the assets purchased outright but that a chance is bought as well—a chance of sharing in any profits which may be made during the currency of that financial year.

*Wigmore (H. M. Inspector of Taxes) v. Thomas Summerson and Sons, Ltd.*², was the case of a vendor of war loan stock bearing interest payable without deduction

of tax. The sale was effected on the 10th April, 1923, with interest rights. The vendor was assessed for the year 1923-24 in respect of the amount of interest said to have accrued on the stock in the period between the last payment of interest and the sale of the stock. It being contended that the price received by the vendor on sale of stock included this interest. The purchasers said that they were not liable to tax in respect of the income which had been accruing on the security they had purchased in a period anterior to the date on which they purchased. It was observed that the truth of the matter was that the vendor did not receive interest and interest was the subject matter of the tax. But he received the price of an expectancy of interest which was not the subject of taxation. It was not argued that the interest accrued *de die in diem* and the vendor was held not assessable in respect of the interest accrued at the date of the sale of the stock.

*The Commissioners of Inland Revenue v Pilcher*¹ was the case of the sale of an orchard inclusive of the year's fruit crop. The assessee had valued the cherries which were on the trees at £2,500 and had put a man immediately in the orchard after he had purchased it at the auction. He commenced to pick the fruit on the 25th May, 1942 and completed the operations on the 12th June, 1942. He realised £2,903 as the price of the cherries. This sum was brought into the profit and loss account as a trading receipt and the contention of the assessee was that in computing his profits he was entitled to charge the sum of £2,500 being the purchase price of the cherries sold for £2,903 which sum had been brought into credit as a trading receipt. This contention was negatived and it was observed by Lord Justice Jenkins at page 332 —

It is a well settled principle that outlay on the purchase of an income-bearing asset is in the nature of capital outlay and no part of the capital so laid out can for income-tax purposes be set off as expenditure against income accruing from the asset in question.

There is a further passage in the Judgment of Jenkins L.J., at page 335 which is very instructive. It has been contended that the revenue should look at the transaction from the assessee's point of view and should consider it in a manner favourable to him. This contention was dealt with in the manner following —

One has to remember that this transaction concerned not merely Mr. Pilcher but also the vendor of the orchard. Mr. Pilcher was able to buy the orchard complete with the cherries from the vendor and by that means according to his own calculation the cherries stood him in £2,500. It by no means follows that if he had been minded to buy the cherries from the vendor apart from the land as a separate transaction the vendor would have been willing to sell them to him for £2,500 or at any price. The difference is obviously a material one from the vendor's point of view because, dealing with the matter as he did he was selling a capital asset and the resulting capital receipt, *prima facie* would attract no tax. If the seller sold the cherries separately in the way of trade he would at once have created an income receipt on which *prima facie* tax would have been exigible. Therefore the alteration in the form of the bargain required to make it more favourable to Mr. Pilcher from the tax point of view would have involved an alteration not merely of form but of substance owing to its adverse effect on the tax situation of the vendor and it cannot be assumed that the bargain thus altered would have been one to which Mr. Pilcher could have secured the vendor's agreement.

These observations throw considerable light on the situation obtaining in the cases before us. It will be remembered that the total amount of Rs. 75,77,693 received by the Sassoons on the transfers of the Managing Agencies was taken by them to the Capital Reserve Account. No part of that amount was treated by them as a receipt of income and it is debatable whether any part of the same could have been allocated as a receipt of income even though the transferees

had desired to do so. All that the transferees obtained under the deeds of assignment and transfer executed by the Sassoons in their favour was an income bearing asset consisting of the office of Managing Agents, the Managing Agency Agreement and all the rights and benefits as such Managing Agents under the Agreements and no part of the consideration paid by the transferees to the Sassoons could be allocated as a receipt of income by reason of their contribution towards the earning of the commission in the shape of services rendered by them as Managing Agents of the Companies for the broken periods. What the transferees obtained under the deeds of assignment and transfer was the expectancy of earning a commission in the event of the condition precedent by way of complete performance of the obligation of the Managing Agents under the Managing Agency Agreements being fulfilled and a debt arising in favour of the Managing Agents at the end of the stated periods of service contingent on the ascertainment of net profits as a result of the working of the Company during the calendar year.

The last case to which we were referred by the learned counsel for the Sassoons was *The City of London Contract Corporation, Ltd v Styles (Surveyor of Taxes)*¹. The part of the business taken over by the assessee in that case consisted of unexecuted and partly executed contracts. The contracts were executed after the date of the purchase by the assessee and the assessee sought to deduct the price paid for the contracts from the profits arising from their performance. This deduction was not allowed, because whatever price the assessee paid for the purchase of the business was treated as the capital which had been invested for the purpose of acquiring that business and the assessee could not deduct from the net profits of the working of the business after the date of the purchase any part of the capital which had been thus invested by it. This result was achieved even though in the purchase of unexecuted contracts there was included the part of the work done towards the performance of the contracts by the vendors. The assessee derived the benefit from such partial execution of the contracts by the vendors, nevertheless the value of such work was not treated as any income which had accrued to the vendors and which the assessee was entitled to deduct from its profits arising from the performance by it of those unexecuted contracts.

Learned counsel on behalf of the transferees contended that all these cases were concerned with the question whether the income derived by the assessee out of the income bearing asset after the date of the purchase could be treated as a capital expenditure so far as it formed part of the consideration paid by the assessee to the vendors and in none of these cases were the Courts concerned with the question that arises before us, viz., whether any part of the income which was actually received by the assessee could be said to have accrued to the vendor. Even though the question did not arise in terms it is nonetheless involved in the consideration of the question whether the assessee was liable to pay the income-tax on the whole of the income thus derived by him. As was pointed out by Jenkins, L.J., in *The Commissioners of Inland Revenue v Fulcher*², quoted above, the vendor's point of view cannot be neglected and once you come to the conclusion that the assessee alone is liable it necessarily follows that the vendor certainly has nothing to do with the same. If it were otherwise the vendor would certainly be liable to tax and no purchaser would miss the opportunity of avoiding his liability for that portion of the income which can be said to have accrued to the

vendor As a matter of fact such a contention was taken by the purchasers in *Wigmore (H M Inspector of Taxes) v Thomas Sumner and Sons, Limited*¹, where they declined to be assessed for tax in respect of income which had been accruing on the securities they had purchased in a period anterior to the date at which they did purchase This contention however did not prevail and the vendors were held not assessable in respect of the interest accrued on the date of the sale of the stock

It is therefore clear that the Sassoons had not earned any income for the broken periods nor had any income accrued to them in respect of the same and what they transferred to the transferees under the respective deeds of assignment and transfer did not include any income which they had earned or had accrued to them and which the transferees by virtue of the assignment in their favour were in a position to collect If any debt had accrued due to the Sassoons by the respective Companies at the dates of respective transfers of Managing Agencies such debt would certainly have been the subject matter of assignment But if what was transferred by the Sassoons to the respective transferees were merely expectations of earning commission and not any part of the commission actually earned by them or which had accrued to them under the terms of the Managing Agency Agreements, what the transferees received from the Companies under the terms of the Managing Agency Agreements which were thus transferred to them would be their income and no part of such income could ever be said to have accrued to the Sassoons, during the chargeable accounting period

In view of the above it is unnecessary to deal with the contention which was urged by the learned counsel for the Sassoons that even if there be an assignment of income the assignee and not the assignor would be liable to pay the tax He referred us to the case of the *Commissioner of Income tax, Bombay Presidency v Tata Sons, Ltd*², in support of this contention of his and he also referred us to note G at page 209 in Simon's Income Tax, 2 Edition, Volume II where the ratio of *Parkins v Warwick (H M Inspector of Taxes)*³, relied upon by the High Court in the judgments under appeal has been criticised We do not however think it necessary to go into this question as in our opinion there were no debts due by the Companies to the Sassoons which were assigned under the respective deeds of transfer and assignment

The only question which remains to consider is whether section 36 of the Transfer of Property Act imports the principle of apportionment in regard to the commission received by the transferees herein Section 36 of the Transfer of Property Act provides—

In the absence of a contract or local usage to the contrary all rents annuities pensions dividends and other periodical payments in the nature of income shall upon the transfer of the interest of the person entitled to receive such payments be deemed, as between the transferor and the transferee, to accrue due from day to day and to be apportionable accordingly but to be payable on the days appointed for the payment thereof

It may be noted that the section applies in the absence of a contract or local usage to the contrary and also applies as between the transferor and the transferee There is no room for the application of these provisions as between the subject and the Crown (*Vide The Commissioners of Inland Revenue v Henderson's Executors*⁴ The

¹ (1925) 9 Tax Cases 577

² (1938) 7 I T R 195

R-103

³ (1943) 25 Tax Cases 419

⁴ 16 Tax Cases 282 at 291

contract to the contrary, must of necessity be as between the transferor and the transferee and it is only when there is no such contract to the contrary that the rents, annuities, pensions, dividends and other periodical payments in the nature of income become apportionable as between the transferor and transferee, deemed to accrue due from day to day and be apportionable accordingly. The deeds of assignment and transfer executed by the Sassoons in favour of the transferees transferred all the rights and benefits under the Agency Agreement to the transferees and there was no question of apportionment of any commission between the Sassoons and the transferees. In fact the transferees claimed to retain and did retain the whole of the commission which had been paid by the Companies to them in the year 1944 and the Sassoons never claimed any part of it as having been earned by them. Whatever was their contribution towards the earning of that commission during the whole of the calendar year 1943 was the subject matter of the assignment in favour of the transferees and that was sufficient to spell out a contract to the contrary as provided in section 36 of the Transfer of Property Act.

Section 26 (2) of the Indian Income tax Act also does not help the transferees because it is only when the person succeeded has acquired an actual share of the income, profits or gains of the previous year that he is liable to tax in respect of it and as set out herein above no part of the commission actually accrued to or became a debt due by the Company to the Sassoons on the dates of the respective transfers of the Managing Agencies to the transferees. In order to attract the operation of section 26 (2) the person succeeded must have had an actual share in the income, profits or gains of the previous year and on the construction of the Agreements the Sassoons cannot be said to have acquired any share in commission for the broken periods.

The whole difficulty has arisen because the High Court could not reconcile itself to the situation that the transferees had not worked for the whole calendar year and yet they would be held entitled to the whole income of the year of account, whereas the transferors had worked for the broken periods and yet they would be held disentitled to any share in the income for the year. If the work done by the transferors as well as the transferees during the respective periods of the year were taken to be the criterion the result would certainly be anomalous. But the true test under section (4) (1) (a) of the Income tax Act is not whether the transferors and the transferees had worked for any particular periods of the year but whether any income had accrued to the transferors and the transferees within the chargeable accounting period. It is not the work done or the services rendered by the person but the income received or the income which has accrued to the person within the chargeable accounting period that is the subject matter of taxation. That is the proper method of approach while considering the taxability or otherwise of income and no considerations of the work done for broken periods or contribution made towards the ultimate income derived from the source of income nor any equitable considerations can make any difference to the position which rests entirely on a strict interpretation of the provisions of section 4 (1) (a) of the Income tax Act.

The result therefore is that the question referred by the Tribunal to the High Court must be answered in the negative. All the appeals will accordingly be allowed. But as regards the costs, under the peculiar circumstances of these appeals where

the Commissioner of Income-tax, Bombay, has supported the Sassoons in Civil Appeal No 3 of 1953 and the brunt of the attack in Civil Appeals Nos 30 of 1953 and 31 of 1953 has been borne not by the Commissioner of Income tax who is the appellant in both, but by the Sassoons, the proper order should be that each party should bear and pay his own costs here as well as in the Court below

Jagannadhadas, J—I am unable to agree with the judgment just delivered on behalf of both my learned brothers. It is with considerable regret that I feel constrained to write a separate judgment expressing the reasons for my not being able to agree with them in spite of my profound respect for their views.

These three are appeals against a judgment of the Bombay High Court by leave granted under section 66 A (2) of the Indian Income tax Act. They arise out of a set of facts mostly common. E D Sassoon & Co Ltd, now in voluntary liquidation (hereinafter referred to as the Sassoons) had the managing agency of three mills (1) E D Sassoon United Mills, Ltd, (2) Elphinstone Spinning and Weaving Mills Co, Ltd, and (3) The Apollo Mills, Ltd. With the consent of the Mill Companies and by virtue of clauses in the managing agency agreements enabling thereunto, the Sassoons transferred the managing agency of the three mills to three other companies during the course of the calendar year 1943 as follows: (1) to Agarwal & Co, Ltd (hereinafter referred to as Agarwals) on the 1st December, 1943, (2) to Chidambaram Mulraj & Co, Ltd (hereinafter referred to as Chidambarams) on the 1st June, 1943, and (3) to Rajputana Textile (Agencies), Ltd, on the 1st July, 1943. The assessments with which we are concerned are those of (1) Sassoons (2) Agarwals and (3) Chidambarams and relate to income by way of managing agency remuneration paid in the year 1944 by the Mill Companies to the respective assignee-companies for the calendar year 1943. For Sassoons and Agarwals the assessment year was 1944-45 and the accounting year was the calendar year 1943. For Chidambarams the assessment year was 1945-46 and the chargeable accounting period was from 1st July 1943 to 30th June, 1944. The tax was assessed on the basis not of receipts but of accrual. The income-tax authorities treated the total remuneration for the entire year 1943 in each case as income which accrued to the assignee-companies in the respective accounting periods. The assignee-companies objected on the ground that part of the remuneration, up to the date of the respective assignments, accrued to the assignor-company, viz, Sassoons and that they were, therefore, liable to be assessed only in respect of the balance of the remuneration referable to the portion of the calendar year 1943 subsequent to the respective dates of the assignments. The objection was overruled and the assessments were made. On appeal to the Income tax Appellate Tribunal, their contention was accepted and the assessments were modified. It may be mentioned that the Rajputana Textiles (Agencies), Ltd, does not appear to have filed any appeal to the Tribunal. Meanwhile (presumably by way of caution) the income tax authorities issued notices to the assignor-company, viz, Sassoons, under section 34 of the Indian Income tax Act and assessed it in respect of the proportionate part of the year's managing agency commission up to the date of the respective assignments. The Sassoons objected to this before the Income tax authorities, but the objection was overruled. It has been stated to us in the case filed by the Sassoons in this Court that the entire net consideration for the three assignments was taken by them into their accounts as capital reserve. But this finds no mention in the Tribunal's statement of the case to the High Court.

How the Sassoons made entries in their own accounts is not decisive and has not been relied on before us. On their objection being overruled, the Sassoons filed an appeal to the Income-tax Appellate Tribunal. The Tribunal rejected the appeal in view of the decision they had already given in the appeals filed by the two assignee companies, Agarwals and Chidambarams. The three companies concerned obtained references to the High Court under section 66 of the Indian Income-tax Act. The question referred by the Tribunal in each of the three cases was the same and is as follows:

Whether in the circumstances of the case was the managing agency commission liable to be apportioned between the assessee company and the assignee (or assignor as the case may be) "

The High Court answered the question against the Sassoons and in favour of the other two. What the High Court held was in substance that (1) the managing agency remuneration for the year in question accrued as the joint income of both the assignor and the assignee and was apportionable between them, and (2) the assignee companies received the assignor's share of the joint income by virtue of the assignments of the assignor's share and hence to that extent it was not their taxable income but continued to be the taxable income of the assignor. There are thus three appeals, one by the Sassoons against the Income tax Commissioner and the other two by the Income tax Commissioner against Agarwals and Chidambarams respectively. In the first of the appeals, the Income-tax Commissioner supports the position taken up by the Sassoons while in the other two the Commissioner is the appellant and contests the position taken by the Agarwals and the Chidambarams. Thus it will be seen that though in form the three appeals are each between the Income tax Commissioner and one of the three companies, in fact, they raise a controversy between the assignor-company, the Sassoons, on the one side and the two assignee companies, the Agarwals and the Chidambarams on the other, the Commissioner supporting the Sassoons and opposing the other two.

The arguments before us covered a wide range and were advanced on the assumption that what the High Court held was that the Sassoons became entitled on the very date of the respective assignments to a proportionate share of the year's remuneration for the managing agency, and that accordingly that share accrued to the Sassoons as their taxable income, then and there, and did not cease to be such notwithstanding the assignment thereof. The case was accordingly debated before us as though the decision turned upon the question whether any income *could* accrue to the Sassoons on the dates of the respective transfers of the managing agency to the transferees. It is necessary, therefore, to clarify, at the outset, what the question was which was directly raised on the reference made to the High Court and what in the view of the High Court, was the date when a share of the year's remuneration accrued to the Sassoons as its income. It appears to me that the judgment of the High Court taken as a whole is based only on the view that the entire managing agency remuneration for the year accrued on the completion of the year, i.e., on the 31st December, 1943, and that when it so accrued it accrued both to assignor and to the assignee together. This appears from the following passage of the judgment of the High Court:

"In order to levy income tax it is not enough to enquire when a particular income accrues. What is more important and what is more pertinent is to enquire whose income it is which is sought to be taxed. Assuming that this particular income accrued on the 31st December and till 31st December there was nothing earned even so when the income does accrue the question still remains to be answered as to whose income it is which has accrued on the 31st December, 1943."

It appears to me also that it is on the footing of the accrual on the completion of the year that the High Court dealt with the question of assignment of the income as appears from the following passage

And clearly one of the rights which E.D. Sassoon & Co., Ltd., had, was to receive the managing agency commission (share therein?) when it accrued on 31st December. They transferred that right

From these passages it appears to me clear that the High Court proceeded on the view that income accrued at the end of the year to both together and that what passed to the assignee under the assignment included a future right of the assignor to a share in the remuneration, when it accrued on the completion of the year, and *not* on the view that the assignment operated as the transfer of a present right to such a share on the very date of the assignment. It is in view of the assumption that the remuneration for the year accrued only on the 31st December that the Income tax Appellate Tribunal also took care to say, in making their reference to the High Court, as follows

The question is not *when* the managing agency commission accrued. The real question is to *whom* it accrued

It appears to me therefore that it is not correct to approach the consideration of this case as though the decision therein turned directly upon the question whether any income had accrued to the Sassoons on the dates of the respective transfers of the managing agency to the transferees

In the arguments before us considerable stress was laid by learned counsel appearing for the Sassoons on the fact that the managing agency agreements with which we are concerned provide for annual remuneration for an year's work. It was pointed out that the remuneration payable was fixed as commission at a certain specified percentage of the net profits of the respective Mill Companies. So far as the Sassoons United Mills, Ltd., are concerned, whose managing agency had been assigned to Agarwals the commission was in terms stated in the agency agreement to be *per annum* and on the *annual* net profits of the company. So far as Elphinstone Spinning and Weaving Mills Co., Ltd., are concerned, whose managing agency was assigned to Chidambarams, the remuneration is merely stated in the corresponding agreement to be a percentage of the net profits of the company, but is not in terms stated to be *per annum* or on the *annual* net profits. But there can be no reasonable doubt that as a matter of construction, the remuneration in the latter case also must be taken to be *per annum* and on the *annual* net profits notwithstanding some argument before us to the contrary. Having regard to this basic fact the following are, in substance the arguments put forward before us by learned counsel for the assignor Sassoons. (1) The managing agency commission was payable in respect of services for an entire calendar year and not for a portion thereof and therefore no commission became due to the Sassoons for the services rendered by them to the respective Mill Companies for broken periods of the year up to the dates of the respective assignments. (2) Since no remuneration became a *debt due* to the Sassoons from any of the Mill Companies on the dates of the respective assignments no taxable income accrued to them for the broken periods. (3) By the dates of the respective assignments, the Sassoons had only a bare expectancy, if any, to receive remuneration for the broken period and this expectancy could not be the subject matter of any assignment, and (4) The true legal position, therefore is that what was assigned was an income bearing asset, *viz.*, the managing agency which was the source of income and which entitled the

respective assignees to receive all the remuneration for the year payable under the managing agency agreement subsequent to the respective dates of assignment. Accordingly the same became in its entirety taxable income in the hands of the respective assignees and no portion of it accrued at any time as taxable income of the assignor-Sassoons.

In the view that I take of the High Court's judgment as to the date of accrual of the income and as to the scope of the question presented on the reference, the first three of the above arguments do not appear to me to call for any examination. In the present case no question arises as to the enforceability of the claim for a proportionate share of the remuneration by the assignor from the very date of assignment. Nor does any question arise as to the non-payability of remuneration on account of non-completion of the work. The year's work has been completed by the assignee company in continuation of that of the assignor company. The total remuneration for the year has in fact been paid into the hands of the assignee-company. The only questions, therefore, are (1) whether the money so received accrued by way of remuneration for the year's work and became taxable income on the 31st December, 1943, (2) if so, whether it was the joint income of the assignor and the assignee or the sole income of the assignee, and (3) whether the assignment operated to transfer the assignor's share of the income on its accrual.

The answer to the first of the above questions seems to me to admit of no doubt. The remuneration was for the year's work. The year's work was completed on the expiry of the year. The right to receive the remuneration became, therefore, vested on the 31st December, 1943. It is true that in Agarwal's case there is a clause in the original managing agency agreement that

the managing agency commission shall be due yearly on the 31st day of March in each and every year and shall be payable and be paid immediately after the annual accounts of the Mill Company have been passed by the shareholders.¹

It has been urged, in reliance on this clause that the accrual of the income, in so far as the case of Agarwal is concerned, is not on the 31st December but on the 31st March next. In the first place such a contention, in so far as it relates to the date of accrual, is not permissible in view of the clarification in the order of reference made by the Tribunal to the High Court and in view of the specific and categorical language of some of the grounds in the statements of the case filed before us both by Sassoons and the Income tax Commissioner showing 31st December, 1943, as the date of accrual of the entire remuneration (*Vide* paragraphs 19 (1), 26 (e) and (g) of the Sassoons' statement, and paragraphs 12, 15 (1), (2) and (5) of the Income tax Commissioner's statement in Civil Appeal No. 3 of 1953). But even if the contention be permissible and granting the view strenuously urged on behalf of the appellant Sassoons that there is no accrual of income until there exists a right to receive it, I do not think that the clause in question has any relevancy so far as the date of accrual of income is concerned. Accrual of income for purposes of taxation, does not depend on the question as to when the income becomes payable. It depends only on when a vested right to receive the income arises (*See Commissioners of Inland Revenue v Gardner Mountain & D Ambrunent, Ltd*²). The accrual is accordingly complete when the right to the remuneration becomes vested by the occurrence of all the events on which the remuneration depends. A mere clause that the remuneration shall be due at a later date, not-

withstanding that all the events on which the remuneration depends have occurred, can only have the effect of postponing the liability for payment and not of postponing the vesting of the right to income. The requirement of lapse of further time after the occurrence of all the qualifying events is not in itself an additional event which imports any element of contingency in the right. It appears to me, therefore, that the above clause which has been relied upon—whatever the reason may be for the distinction which the language seeks to suggest between *due* and *payable*—can have no bearing on the *date* of the accrual and cannot have the effect of postponing the accrual from the 31st December to 31st March. But even otherwise, this does not at all affect the final conclusion in this case reached by the High Court of Bombay. If the view of the High Court is correct that the income accrued both to the assignor and to the assignee after the completion of the year's work, it seems to matter little whether that accrual is on the 31st December or on the 31st March next.

The further question as to whether the view taken by the High Court that the assignments operated to transfer to the assignee the assignor's share of the year's remuneration after it accrued to him as his income and whether it continues to remain the assignor's taxable income in spite of the assignment, may also be shortly dealt with. If the High Court be right in its view that the remuneration accrued both to the assignor and to the assignee together, whenever it may be, then it is clear that on the respective dates of the assignment, the assignor had a future right to a share of the remuneration on the completion of the year. If so, there is ample authority for the position that the assignment of such a future right is valid and becomes operative by way of attaching itself to the right when it springs up. (See *Bansidhar v Sant Lal*¹, *Misri Lal v Mozhar Hossain*², *Palaniappa v Lakshmanan*³ and *Baldeo v Miller*⁴). The validity of such an assignment as between the assignor and the assignee and the effect thereof on the assignor's future right may also be supported with reference to the principle of estoppel feeding title which finds recognition in section 43 of the Transfer of Property Act. For the further position, viz., that a person continues to be liable for tax in respect of accrued income notwithstanding assignment thereof operating on or after such accrual, there is authority in *Parkins v Warwick*⁵. This view is confirmed by the following passages in the Privy Council case in *Pondicherry Railway Co., Ltd v Commissioner of Income tax, Madras*⁶.

¹ Profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits.

The destination of the profits or the charge which has been made on those profits by previous agreement or otherwise is perfectly immaterial.

(Quoted out of an extract from the case in *Gresham Life Assurance Society v Styles*⁷.)

It appears to me that these passages constitute a clear recognition of the principle that when once income accrues to a person, an assignment operative in respect thereof, does not affect his taxability for that income. It may be mentioned that it is not seriously disputed that the consideration for each assignment included the value of the prospective advantage of collecting the remuneration for the entire

1	(1887) 1 L.R. 10 A. 133	5	(1943) 25 Tax Cases 419
2	(1886) 1 L.R. 13 C. 262	6	(1931) 61 M.L.J. 251 L.R. 58 I.A.
3	(1893) 1 L.R. 16 M. 429	239	1 L.R. 54 M. 691 (P.C.)
4	(1904) 1 L.R. 31 C. 667	7	L.R. (1892) A.C. 309

year, i.e., in the sense that the actual consideration paid was higher than what it might have been if the assignment had taken place at the very commencement of the year

The only substantial question, therefore, which this case raises is whether the view taken by the High Court that the remuneration for the year accrued as income both to the assignor and the assignee, is correct. It is apparently as an answer to this question that learned counsel appearing for the Sassoons put forward the argument No. 4 above enumerated, viz., that the assignment of managing agency is the transfer of an income bearing asset and that all income received subsequent to the date of assignment is entirely the assignee's taxable income. It is the validity of this argument that now requires examination. The cases that have been relied on in support of this argument are the following: *The Commissioners of Inland Revenue v Forrest*¹, *Wignore v Thomas Summerson*², and *Commissioners of Inland Revenue v Pilcher*³. *Commissioners of Inland Revenue v Forrest*¹ is a case of purchase of certain shares and the income derived therefrom and is analogous to the second head of income chargeable to income tax under section 6 of the Indian Income tax Act viz., Securities. The income therefrom is directly referable only to the ownership of the shares or securities. Mere lapse of time makes income payable and the taxation depends on the receipt of the income. *Wignore v Thomas Summerson*² is also a case similar to the above. *Commissioners of Inland Revenue v Pilcher*³ is the case of a sale of an orchard inclusive of the year's fruit crop, which by the date of the sale does not appear to have become ripe enough to be treated as a severable item of property. This was a case of property whose ownership itself in the ordinary course and by lapse of time, gives rise to income and is analogous to head No. 3 of section 6 of the Indian Income tax Act. It is interesting to note, that in this case, the learned Judges make a distinction between *fructus industriales* and *fructus naturales* and point out that the fruits derived from the orchard being cherries are *fructus naturales* and not *fructus industriales*. That the result might have been different if it was *fructus industriales* appears clearly, at least so far as Lord Justice Singleton and Lord Justice Tucker are concerned. In the case of *fructus industriales* the income does not arise by mere ownership but as a result of further investment and labour which may be the effective source of income. These decisions refer only to cases where the sole or effective source of income is mere ownership and taxability depends on receipt of the income.

Another case that has been relied on before us is the *City of London Contract Corporation v Styles*⁴. That was a case where one company purchased as a going concern the business carried on by another company, as contractors for public works. It was claimed that the assignee-company was entitled to deduction from their taxable income for a portion of the purchase price which may be attributed to the purchase of the right, title and interest to, and the benefit of, certain building contracts of the company, from the execution of which, a portion of the net profits of the company arose. This was negatived on the ground that the entire purchase price was capital investment and that what all was received later on was income derived by the execution of the contracts so purchased. This, so far as it goes, may seem to suggest by implication that there may be a purchase of contracts yet to be executed and that the benefit of the entire profits therefrom is to be treated

1 (1924) 8 Tax Cases 704

2 (1925) 9 Tax Cases 577

3 (1949) 31 Tax Cases 314.

4 (1887) 2 Tax Cases 239

as income in the hands of the purchaser. The report of this case, however, does not indicate clearly whether the contracts whose benefit was purchased were partially executed and if so whether the partial execution was substantial or negligible. The statement of the facts of the case at page 241 of the report shows that the business which was purchased consisted entirely of partially executed or wholly unexecuted contracts, and of the rights thereunder and the benefits to accrue therefrom. If the business consisted of only unexecuted contracts, this case is not an authority for the position contended for on behalf of the Sassoons. But in any case even if some of the contracts were partially executed, there is nothing to show that the execution was of any such extent as to have become a substantial source of income. It may also be noted that this decision is a direct authority only on what is capital expenditure and what is revenue expenditure for purposes of deduction. The point in the form relevant for the present case was not raised there and cannot be taken to have been decided. It is interesting to notice that in Simon's Income Tax, Vol. 2 (1949 Edn.), page 188 paragraph 222, the following passage appears:

*In City of London Contract Corporation Ltd v. Styles*¹ where the company acquired a business including a number of unexecuted contracts it was held that the sum paid for the contracts could not be deducted in computing the company's profits on the ground that the whole of the purchase price of the business was a sum employed or intended to be employed as capital in such trade.

Similarly in *Spicer and Pegler's Income tax and Profits Tax* (20th Edn.), at page 116 it is stated as follows:

Cost of unexecuted contracts taken over with a business (in arriving at the profits from the performance of the contracts)

and the case of *City of London Contract Corporation v. Styles*¹ is quoted as authority. These standard text books also show that this case has been treated as having reference to unexecuted contracts (and not to partially executed contracts) and as being authority for the question as to what are permissible deductions from taxable income of business concerns.

The above cases, therefore, cannot be treated as in any way supporting the contention put forward by learned counsel for the appellant Sassoons that in the case of an assignment of managing agency the entire remuneration for the year's work accrues as a matter of law to the assignee and is his sole income, on the ground that the agency is the source of income and that in this respect it is to be treated as an income bearing asset. No specific authority has been cited before us covering the case of a managing agency nor can the case in *City of London Contract Corporation v. Styles*¹ be treated as an authority showing that in the case of an assignment of partially executed contracts the remuneration or profits relatable to such partial execution is necessarily the income of the assignee.

The question thus raised has, therefore, to be examined on principle. On such examination it appears to me that the argument advanced in this behalf is based on a fundamental misconception. Income of the kind with which we are concerned in this case does not arise by virtue of any mere ownership of an asset.

What produces income is not the ownership of the managing agency but the actual work turned out for the benefit of the principal. It is not the fact of a company having obtained the right to work as a managing agent that produces the income but it is the continuous functioning of the company, as the managing agent in terms of the contract of agency that produces the income. Hence it is the

rendering of the service of the managing agency or the carrying out of the managing agency business, which is the effective and direct source of income. This is not to say that work or service is the subject of taxation. It is the remuneration that is the subject of tax and work is the source of the remuneration. Hence in such a case service or work is the source of income and not the ownership of the right to work. The above legal position has been very succinctly brought out by Lord Finlay, though in another context, in *John Smith & Son v Moore*¹ in the following passage:

The business makes no profits. The profits are not fruits yielded by a tree spontaneously. They are the result of the operations carried on by the owner of the business for the time being.

Therefore, on principle, apart from authority, it appears to me to be erroneous to treat the managing agency agreement as by itself the direct source of income and to treat it as an income producing asset.

An examination of the provisions of the Indian Income tax Act clearly bears out this view. Sections 3 and 4 of the Income tax Act are the charging sections. The charge is (in so far as it is relevant for purposes of this case) on the income of the previous year (a) which is received by the assessee within the taxable territory, or (b) which accrued or arose within the taxable territory to a resident assessee. As stated at the outset the assessment in the present case is based on accrual and not on receipt. Computation of the taxable income is governed by the provisions of Chapter III of the Act. Section 6 thereof enumerates the following heads of income as being chargeable to income tax: (1) Salaries, (2) Interest on securities, (3) Income from property, (4) Profits and gains of business, profession or vocation, (5) Income from other sources. The residual item (5) may for the present purposes be left out. Of the other four heads, items 2 and 3 are the only items in which the taxable income is directly related to the ownership of an asset. In the present case the computation of the taxable income has no relation to those items but may conceivably fall under head No. 1 or head No. 4. At this stage, it is necessary to observe that, though, so far, in the above discussion the managing agency has been referred to as service and the commission therefor as remuneration, for purposes of convenience, the true nature of the functioning of a managing agent where it is a firm or a company which so functions, has been recently held by this Court in *Lakshminarayan Ram Gopal & Son, Ltd v The Government of Hyderabad*² to be a business and the remuneration to be income by way of profits or gains from the business. The income, therefore, falls under head No. 4 and the computation thereof has to be made under section 10 of the Income tax Act. Sub-section 1 of that section runs as follows:—

The tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profits or gains of any business, profession or vocation carried on by him.

Now, in computing the taxable income of the assignee, can it reasonably be said that the remuneration for the entire year is the income of the assignee and that it is the profits and gains of the business carried on by the assignee, when as a fact he stepped into the position of the managing agent only on some date in the course of the year by virtue of the assignment? It appears to me that before income can be attributed under this head to an assessee, it must relate to the business carried on by the assessee himself. In the present case, therefore, the profits and gains of the whole year seem to me clearly to relate to the business carried on both by the

1 L.R. (1921) 2 A.C. 13 at 25

2 Civil Appeals Nos. 292 and 312 of 1950

assignor and the assignee taken together and are hence taxable as income accruing to both and apportionable as such between them. The importance of not overlooking the significance of the phrase "carried on by him" in sub section 1 of section 10, though in a different context, has been emphasised by the Privy Council in *Commissioner of Income tax, Bengal v Shaw Wallace & Co*¹. A recent decision of this Court in the *Liquidators of Purna, Limited v The Commissioner of Income tax, Bihar*² also emphasises this and explains that the phrase "carried on by him" in section 10 (1) of the Indian Income tax Act 'connotes the fundamental idea of the continuous exercise of an activity as the essential constituent of that which is to produce the taxable income'. This phrase appears to me also clearly to connote the idea that the taxable income is that of the very assessee or the combination of assessee whose continuous activity produces the income. Where, as in this case, that continuity is kept up by two persons successively, it appears to me that under this section the profits and gains are the assessable income of both together.

This is in accord with the well accepted notion, under the normal law, that if two persons jointly carry out a work or conduct a business, the total remuneration in fact earned for the work or the total gains made on that business belongs to both of them as their joint property and that such property has to be apportioned between them on some equitable basis. This is quite independent of any question as to whether the claim for remuneration for the work or for the emoluments of the business can be individually or jointly enforced as against the person who is liable to pay. It cannot be disputed that in the absence of any specific contract to the contrary between the persons who contribute to the work or business the fruits of such work or of such business is the joint property of both, when the same has in fact been realised. Nor can it be said that this holds good only in cases where both the persons concurrently join together to earn the remuneration for the work or the profits of the business. There is no reason in law why the same principle should not be equally applicable where the two together contribute to the total work or to the total business in succession as in this case and not in concurrence. If, what arises on such continuous and successive functioning of two persons is the joint remuneration of both, there can be no doubt that such remuneration would be apportionable between them on some equitable basis on the principle that joint property is normally severable. To such a situation section 26 (2) of the Income tax Act would also clearly apply. That section no doubt indicates nothing as to the principle of apportionment. But there is no difficulty in the present case since it is agreed that the apportionment, if any, is to be timewise. This also *prima facie* is the only equitable way of apportionment on the facts of this case.

At this stage it becomes necessary to notice certain provisions of the relevant managing agency agreements which have been strongly relied on as supporting the view contrary to what I have indicated above. Reliance has been placed on two provisions of the managing agency agreement between the Sassoons United Mills, Ltd and the Sassoons which are relevant only in the appeal relating to the Agarwals. The first of these provisions is the one already noticed in another context, viz., clause 2 (d) of the agency agreement which runs as follows:

'The said commission shall be due to the said firm yearly on the 31st day of March in each and every year during the continuance of this agreement'

It is urged that this term stamps the managing agency agreement with the characteristic of an income bearing asset which vests solely in the assignee the right to the entire income payable after the date of assignment. But it appears to me that a term of this kind as a reference only to the payment aspect of the money which constitutes remuneration and has no bearing on the question as to whose income it is for purposes of taxation. Taxable income must be derived from specified sources indicated in the Indian Income tax Act. Since the mere ownership of managing agency cannot as a matter of law be treated as the source of income, as explained above, any term in the managing agency agreement between the principal and the agent entitling only the assignee to receive the year's remuneration and negating to the assignor any direct recourse to his quantum principal for his share of the income, cannot have the effect of denying to the assignor a substantial right to a share in the remuneration if otherwise he has a vested right thereto. A distinction exists in law between the right to receive or get payment of a certain amount of money and the right to the money itself. The right to enforce payment of money may belong to one person. But the beneficial right in that money may belong wholly or partially to another. Benami contracts are familiar examples of such a case. Instances of joint rights in money or money's worth enforceable only at the instance of one out of the persons entitled, in special situations, are easily conceivable. It may be true that there is no accrual of income unless there is a vested right to receive the money which constitutes income. But this proposition has relevance only to the factum or date of accrual but not necessarily to the ownership of the income on such accrual. None of the cases that have been cited before us in support of the proposition that there is no accrual of income unless there is right to receive it negative this view. In the course of the arguments repeated stress has been laid on the proposition that there is no accrual of income unless there is a right to receive the income. This may be so. But it does not follow that the very person who has the right to receive the money which constitutes the income is the owner of that money or that the income accrues to him alone. That must depend on the substantive rights, if any, applicable to a particular situation. A term in a managing agency agreement between the principal and the agent as to the person to whom the remuneration is payable or is to become due can only have been meant as a protection of the principal in respect of multiplicity of claims against himself and cannot settle the substantive rights between persons who may have contributed to earn the remuneration.

The second provision relied on is clause 10 of the managing agency agreement with which the case of Agarwals is concerned. Clause 10 of the agreement runs as follows:

It shall be lawful for the said firm to assign this Agreement and the rights of the said firm hereunder to any person, firm or company having authority by its constitution to become bound by the obligations undertaken by the said firm hereunder and upon such assignment being made and notified to the said Company the said Company shall be bound to recognise the person or firm or company aforesaid as the Agents of the said Company *in like manner as if the name of such person, firm or company had appeared in these presents in lieu of the names of the partners in the said firm and as if such person, firm or company had entered into this Agreement with the said Company* and the said Company shall forthwith upon demand by the said firm enter into an Agreement with the person, firm or company aforesaid appointing such person, firm or company the Agents of the said Company for the then residue of the term outstanding under the Agreement and with the like powers and authorities remuneration and emoluments and subject to the like terms and conditions as are herein contained.

Stress has been laid on the underlined portion of the above clause. It is urged that this as well as clauses 1 and 3 of the managing agency agreement show that

the assignor and the assignee are to be treated as one entity and that on assignment the assignee becomes the managing agent as if his name had been inserted in the managing agency agreement from the beginning, and that the continuity of the managing agency was preserved thereby and that whoever satisfies the description of the managing agent at the time when the commission for the year becomes due, is also the person entitled to the amount by way of remuneration—not, as per this argument by virtue of any mutual arrangement between the assignor and the assignee, but—by the very terms of the managing agency which is the source of income. It is urged, therefore, that this feature stamps the managing agency as an income bearing asset. In substance, therefore, this argument amounts to saying that by virtue of this clause the service of the assignee subsequent to the date of assignment can be tacked on to the service of the assignor for the earlier portion of the year, so as to constitute it service for the entire year which earns the remuneration, as the sole property of the assignee, *i.e.*, that the assignment has to be given retrospective operation from the commencement of the year in respect of the work so far done. But if this clause is to be construed as having such retrospective operation, it must, on the very terms of the underlined portion, become so operative from the original commencement of the agreement itself and not from any particular date or event thereafter. There is no reason to confine such retrospective operation only to the inchoate advantage for remuneration arising from partly finished work of the year. The underlined portion of the clause, if it is to have retrospective effect at all, is comprehensive enough to take within its ambit every other claim which may have accrued but remained unpaid commencing from the initial stage of the agency. On this construction, therefore, the right to every such claim would pass to the assignee. Such a result would obviously be untenable and no reason exists why the retrospective operation, to be imputed to this clause, should be confined to the limited extent which serves the argument put forward in this behalf by the appellant-Sassoons. It appears to me, therefore, quite clear on a fair reading of the entire clause 10 of the managing agency agreement that the only effect thereof is to bring about the result specifically stated in the second portion of that clause (which has been side lined) *i.e.*, that on assignment, the assignee firm shall be entitled to demand and obtain from the principal company a fresh managing agency agreement in its own favour for the residue of the term outstanding and with like powers ~~authorities~~ remuneration and emoluments and subject to the like terms and conditions. In my opinion all that the clause 10 taken as a whole means is no more than that the assignee is entitled to demand a fresh agreement on the same terms and that even without a fresh agreement being formally executed as between the principal Mill Company and the assignee company their mutual rights and obligations will be governed by the old agreement for the residue of the term with the assignee company's name substituted for the assignor company's name. Such effect can only be prospective and not retrospective.

There can be no doubt, however, that though any mere clause in the managing agency agreement that the employer is to be responsible only to the assignee for the payment of the entire year's remuneration is not by itself enough to vest in the assignee a beneficial right to the remuneration of the year, such a right may arise by virtue of a specific or implied term as between the transferor and the transferee, either as part of the deed of transfer or independent thereof. It may be mentioned that in the Agarwal's case there was such a specific term in the agreement preli-

primary to the actual assignment. But learned counsel for the Sassoons expressly disclaimed it on the ground that it was not incorporated in the deed of transfer and was, in any case, superfluous and did not rely on it. In his view the right of the assignee to receive the entire remuneration did not depend on any specific term between the assignor and the assignee but on the fact that what was transferred was an income bearing asset which carried with it a right to the entire income that falls due after the date of assignment. It is on account of the insistence on this view, that as I apprehend learned counsel for the Sassoons disclaimed the above-mentioned special term between the assignor and the assignee as being superfluous. He seems to have sought thereby to obviate the consequence of the contention that the assignor's share of remuneration became the assignee's by virtue of the assignment thereof operating thereon on its accrual and that hence it remained the taxable income of the assignor.

It may be mentioned in this context that clause 10 of the managing agency agreement in Agarwal's case has been relied on by learned counsel for Agarwals to show that while, it may be that in the normal run of events the contract for remuneration under the managing agency agreement is an indivisible contract for a whole year's remuneration on the completion of a whole year's work, this clause necessarily implied divisibility of contract and of the remuneration in the year of assignment since the assignment necessarily took place with the consent of the principal Mill Company (*Vide* section 87 B (c) of the Indian Companies Act). This argument was advanced to support the contention that the Sassoon's share of the year's income accrued on the very date of assignment. Since, however in my view that was not the basis of the judgment of the High Court as explained above and since such an argument is not, in my opinion, open, having regard to the statement of the case by the Income tax Appellate Tribunal as well as of the statements of appellants and respondents herein, I do not consider it necessary to deal with that argument.

In my view, therefore, the continuous and successive functioning by both the assignor and the assignee under the managing agency agreement was the effective source of the year's income. That income accrued on the completion of the year and was the joint income of both the assignor and the assignee. The prior assignments in the course of the year operated as assignments of this future right to a share of the income. It is only by virtue of *inter se* arrangement between the assignor and the assignee, resulting from the transactions of assignment, that the assignee had the right to collect the entire income. Nevertheless, the share in this income which accrued to the Sassoons on the completion of the year remained the taxable income of the Sassoons and they were rightly taxed in respect thereof. The very strenuous arguments of learned counsel for Sassoons to counter the above view are based on the insistence that the managing agency is like property which *per se* produces income and, on ignoring the distinction between right to receive the income and right to the ownership of the income and on treating the former as settling the question of the person to whom income accrues. In my opinion these arguments are unsustainable and the conclusion reached by the learned Judges of the Bombay High Court is correct.

The appeals are, therefore, liable to be dismissed.

I express no opinion on any of the other points raised.

Appeals allowed.

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PAGES.

Anmol Singh v Atma Ram	(S.C.)	731
Catholicos v Athanasius	(S.C.)	736
Sassoon & Co v C I. T., Bombay City	(S.C.)	771
Satya Dev Bushahri v. Padam Dev	..	..	..	(S.C.)	764

INDEX TO REPORTS.

Civil Procedure Code (V of 1908), Order 47, rule 1—Scope—Grounds for review	(S.C.)	736
Income-tax Act (XI of 1922), section 4 (1) (a)—Scope—Managing Agency whose remuneration is payable annually—Transfer of Managing Agency in the middle of a year—Income if can be apportioned for purposes of assessment to tax—Section 26 (2) of Income-tax Act—If attracted	..	(S.C.) 771
—Transfer of Property Act (IV of 1882), section 36—Applicability	..	(S.C.) 771
Representation of the People Act (XLIII of 1951), sections 33 and 35—Scope—Nomination papers bearing only thumb marks of illiterate proposer and seconder—If “subscribed”	..	(S.C.) 731
Representation of the People Act (XLIII of 1951), section 123 (8)—Government servants subscribing nomination paper as proposer and seconder—Effect—Appointment of Government servant as polling agent—If contravenes section 123 (8)	..	(S.C.) 764
United State of Travancore and Cochin High Court Act (V of 1125), sections 8 and 23—Applicability to review application pending in Travancore High Court on 1st July, 1949	..	(S.C.) 736

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CONTENTS

				PAGES.
Articles 191—238
Reports 809—819

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[XVII

THE PROBLEM OF CHARACTERIZATION* AND THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW †

By

PARAS DIWAN, *Lecturer, University Law College, Jaipur*

I—INTRODUCTORY

It can happen, rather it is happening, that *A* and *B* may be husband and wife in one country, while they may not be so in another, *A* may be considered husband of *B* in one country and husband of *C* in another country. *X* may be considered as indebted to *Y* in one country and in another country or other countries he may not be so indebted, a contract between *P* and *Q* may be enforced in one country, while it may not be enforced in another, and so on.

This is due to the nature of Private International Law.

That many rules of Private International Law are jejune, otiose, conflicting and unsettled,¹ and that not less often they have yielded to bizarre results, leaving their helpless victim² to moan and groan under their heavy weight from which he or she can seek relief nowhere, and creating such a legal conundrum from which sometimes even the members of Bar or Bench find it difficult to extricate themselves, are well-established facts. For this state of affairs in Private International Law it has been said³ that it is due to the fact that the rules of Private International Law are in a formative period and certain inherent problems thereof are such that they defy all attempts to an amicable solution. That could be an explanation but not a justification. The fact remains that, if law has to serve society, out of this myriad of confusion a solution has to be evolved, the rules have to be socially trained, and Private International Law, like any other branch of law, has to be cast in a mould which will not only be systematic but also conducive to social progress and international intercourse.

* This problem has been discussed under various names by different writers. Bartin gave it the name of Theory of Qualifications. Other writers e.g. Cheshire, Beckett, Nussbaum etc. have discussed it under the head Classification while writers like Morris and Falconbridge prefer to discuss it under the heading Characterization. The present writer submits that the use of the latter form is most appropriate for the discussion of the problem.

† In this paper the writer with a view to shorten the length of the paper has avoided a discussion of many cases which have been customarily discussed under the present problem.

1 Whether one looks at the law of marriage, recognition of foreign judgments or the law of contract one is faced with conflicting decisions whose reconciliation is not possible and sometimes, therefore, it is impossible for a lawyer to say what law is.

2 See *Ogden v Ogden* L.R. (1908) P. 46. In *re Bethell* L.R. (1837) 38 Ch. 220.

3 Most of the writers on Private International Law have given this explanation, and probably, in the present submission, no other justifiable explanation is possible.

Our Courts have, hitherto, invariably followed the rules of British Private International Law, probably there was no other alternative. But to day it is neither necessary nor desirable. As every country has its own rules of Private International Law, so we can have ours, though it should not be taken to mean that the writer wants to convey that we need not pay any heed to international uniformity of the rules, what he wants to stress is the need to evolve an independent system of Private International Law of course, considering the need of international uniformity, but in no case trying to ape some one or other system. Mr Justice Sinha very pertinently remarked

"The Courts in India are now at liberty to lay down and follow their own rules with regard to Private International Law, and in this regard we are in a very happy position since we can adopt the rules laid down in various countries as accord best with our sense of justice, equity and good conscience. We can profit by their experience and avoid their errors" ¹

The learned judge has stressed the need of the study of comparative law and also of remembering our social context. In the present submission, probably no other branch of law than Private International Law can profit most from this study, though hazards of that study are not to be forgotten.

Like many other problems of Private International Law, the problem of characterization and the doctrine of *renvoi* are shrouded in a heavy fog, and the voluminous literature existing on the subject, though brings the problem to the fore and also attempts to clear it of some of the fog, appears to thicken it rather than to really clear it of. Much is due to the nature of the problem, and much is due to the existence of different legal systems in the world, which are not only different but contradictory, and probably much is also due to the fact that very logistic view of the problem has been taken by some writers and judges. In the present submission if an attempt is made to solve the problem so that it may help in the administration of justice and provide relief to the parties seeking it, probably, we will have to give up logistic approach, the solution thus arrived at might be loose, but it is hoped that it would go to solve the problem. The needs of justice are far greater than of the logic.

Therefore the purpose of the present paper is not so much to propound author's own theory—Private International Law abounds in such theories—as to present the problem in a systematic way, to bring out clearly the issues involved therein, and the complications arising thereof and to suggest a solution, if possible.

II —THE PROBLEM

The rules of Private International Law are applied when a Court is called upon to decide a case which contains some foreign element. Although it is not incumbent on the municipal Courts to decide cases involving foreign elements by applying some or other foreign law and, at least in theory, the Courts can decide such cases exclusively by applying internal law, yet in practice the Courts decide such cases not exclusively by reference to the internal law of the forum but by reference to some or other foreign law which according to the rules of Private International Law, is deemed applicable to the cases. For instance, an Indian Court is seised of a case where it has to decide whether it would accord recognition to polyandry the parties

to the case were domiciled and married in Tibet where polyandry is recognized, and the moveable property, the succession to which was in dispute, was situated in India, on the determination of the question would depend the determination of the issue, *i.e.*, who would succeed to the property. Or, a Hindu domiciled in India and having a Hindu wife, goes to London and marries there a woman domiciled in Germany. Will an English Court accord recognition to polygamous unions, or to what extent will it accord them recognition on the determination of this question would depend whether the marriage in London was valid. Or, an Indian enters into a contract with an Italian. According to Indian Law a contract must be supported by consideration¹, while according to the Italian Law it need not be which law will govern the transaction, Indian or Italian? Or, under the French Law the breach of a marriage contract is considered as a tort, while under the English Law it is considered as a breach of contract if the case is adjudicated before an Indian Court, which law would it hold to be applicable?

To decide cases involving foreign element, or elements, a Court (provided it has decided that it had jurisdiction) has first of all to determine whether a given factual situation gives rise to rights, or imposes obligations, or creates a legal relation or an institution or an interest in a thing². Thus, the question is in reference to what law it is going to characterize the factual situation in question so that it may reach to a socially desirable result?

How cardinal this question is, is realized when it is understood that without this the Court can proceed no further in the case. For instance, the following are the well recognized rules of Private International Law: capacity is governed by the law of the domicile³, formalities by the *lex loci celebrationis*⁴, rights to immovables by the *lex situs*⁵, etc. Unless the Court determines what is meant by capacity, formalities or immovables it will be well nigh impossible for the Court to proceed with the case.

This problem has become rather acute due to the fact that a particular relationship, a situation, or a particular institution is characterized differently by different systems of law. And this will continue to present difficulties even if nations of the world arrive at a uniform code. For example, according to the rules of characterization under the British Private International Law, the Statute of Fraud⁶ and the Statute of Limitation⁷, relate to procedure and not to substance, a marriage

1 Sect on 25 of the Indian Contract Act recognizes three exceptions to this general rule.

2 See Falconbridge Characterization in the Conflict of Laws 1937 *Law Quarterly Review* p. 235.

3 This has been so laid in numerous cases though it cannot be said that this rule is of universal application. The applicability of this rule in marriage contracts and in contracts generally has been doubted. In the former the current is that the law of matrimonial domicile governs and in the latter there is conflict whether capacity should be governed by the proper law of the contract or by the law of the country with which the contract has real contact. While on the continent the capacity is normally governed by the law of nationality.

4 Probably there is no other rule of Private International Law like this which has found universal application. It is now universally accepted that the formalities are governed by *lex loci contractus* (or *lex loci celebrationis*). But see *Mehata v Mehata* (1945) 2 All E.R. 690.

5 See *Re Hoyle* L.R. (1911) 1 Ch. 58. As regards this rule practically there is no controversy now.

6 *Leroux v Brown* (1832). The decision in this case was doubted in by Willes J. in *Williams v Wheeler* (1860) and also in *Gibson v Holland* (1865). This has been almost universally condemned by writers on Private International Law. See Cheshire Private International Law 76-78. Beckett the Question of Classification in Private International Law 1934 British Year Book of International Law 69, Falconbridge Characterization in the Conflict of Laws 1937 *Law Quarterly Review*, Lorenzen The Statute of Fraud and the Conflict of Laws Selected Articles on Conflict of Law p. 322.

7 This rule is considered to be the established rule of the Anglo-American systems of Private International Law. But this construction has been doubted by some, see Lorenzen, the Statutes of Limitation and the Conflict of Laws loc. op. cit. p. 352.

revoking a will¹, is a part of matrimonial law and not of testamentary law; the French law prohibiting the marriages of minors relates to formalities², and not to capacity, whether things or interests in things are moveable or immoveable³, is to be determined by the *lex situs*; the formalities of marriage are to be determined by the *lex loci celebrationis*⁴, the capacity to marry is governed by the law of domicile of the parties⁵, whether a marriage is void or voidable is to be determined by reference to English Law⁶, the Argentine rule permitting marriage by proxy is a matter relating to formalities⁷ and so on. On the other hand, the Statute of Limitation is considered to be relating to substance by French and German Laws⁸, the rule prohibiting marriages of minors, under the French Law, is considered as question relating to capacity⁹, a marriage revoking a will is considered to be a matter relating to testamentary succession by French Law¹⁰, etc.

These different rules of placing the same relation, the same factual situation, or the same institution in diverse categories has not less often led to grotesque results. This may be shown by the following two illustrations.

*Ogden v Ogden*¹¹—In September, 1898, without the knowledge of their parents, an English woman, domiciled in England and a Frenchman, domiciled in France, married in London.

After sometime, the father of the Frenchman when he came to know of this marriage, took him to France and got the marriage annulled, as according to French Law a person under 25 years could not perform a valid marriage without the consent of his parents.

Subsequently the Frenchman contracted another marriage in France. Upon hearing this, the Englishwoman brought proceedings in the High Court of England for the dissolution of marriage on the ground of desertion and adultery of the husband, she also asked that her marriage should be declared as null and void.

The petition was dismissed for want of jurisdiction.

In October 1906, she married an Englishman, William Ogden, with whom she continued to live for sometime. When Ogden filed a suit asking for a decree of nullity of marriage on the ground that at the time of marriage she was already

1 *Re Martin*, L.R. (1900) P 211.

2 *Simons v Mallack* (1860), *Ogden v Ogden*, L.R. (1908) P 48.

3 *Re Hoyle*, L.R. (1911) 1 Ch. 179.

4 See *Scrimshead v Scrimshead* (1752), *Dalrymple v Dalrymple* (1811), *Warrender v Warrender* (1831), *Harcy v Farme* (1882), *Berthoume v Dastours*, L.R. (1930) A.C. 79 (P.C.). In the last case, their Lordships of the Privy Council observed: "If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered as good marriage."

5 See footnote 3.

6 *De Reneville v De Reneville*, L.R. (1948) P 100, in this case the Court of Appeal has reviewed all earlier cases on the matter.

7 *Apt v Apt*, L.R. (1948) P 83 and also see *Lorenzen*, Marriage by Proxy, loc. op. cit., p. 379.

8 See the French case *Benton v Horeau*, in which the statutes have been considered as relating to formalities. The converse English case is *Leroux v Brown*. See their discussion by Beckett, pages 69-70.

9 See Articles 144, 148, 151 and 170 of the French Civil Code. At pages 76-79, Beckett has discussed them fully.

10 See The Maltese Marriage Case.

11 L.R. (1908) P 48.

a married woman and her marriage was not annulled, the lower Court pronounced a decree nisi from which the Englishwoman appealed.

The Court observed that her marriage with the Frenchman was valid as the English Courts would not recognise the nullity decree pronounced by the French Court and therefore held that her marriage with Mr Ogden was a nullity.

The result of the case is obvious. The parental consent was characterized by the English Court as a matter relating to formalities and as formalities are governed by the *lex loci celebrationis*, the first marriage was valid according to the *lex loci celebrationis*.

Polygamous unions—In earlier cases¹, the English Courts refused to accord any recognition to polygamous unions. The logical result of this would have been that, say, if an Indian already having a wife in India married an English woman in London, this marriage then would have to be considered as valid, because in the eyes of English Law his first marriage was non-existent. But in subsequent cases it was held that for some purposes polygamous unions will be recognized².

However this has not solved the problem entirely, for, as is shown by many cases, the problem of polygamous marriages is still shrouded in thick confusion. It is now settled that the English Courts will recognize polygamous marriages and the issues of such marriages will also be recognized provided the domicile of the man considers them as valid³. If the domicile of the woman does not recognize them as valid, the English Courts will not recognize them⁴.

In some cases when the position of polygamous marriages in British Private International Law led to gross injustice, the Courts abandoned the principles and decided the cases in a way which was more in consonance with justice⁵. In *Chetty v Chetty*⁶, when the English wife of an Indian Hindu brought judicial separation proceedings, it was argued by the husband that his marriage being a polygamous marriage was not subject to the jurisdiction of the Court. This plea was not accepted. In *Mehata v Mehata*⁷, when the English wife of an Indian Hindu asked for the declaration of nullity of her marriage which was performed in India,

1 *Hyde v Hyde* (1866) *Warrender v Warrender* (1835). In the former case Lord Penzance remarked: "I conceive that marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of others." Applying this definition the Court in *In re Bethell* case reached to the conclusion that the child of the Englishman, domiciled in England, born of a marriage contracted in South Africa with a woman of Baralong tribe which allowed polygamy was not legitimate. This was held by the Court despite the fact that the Englishman never took another wife in his lifetime. However in subsequent cases the scope of this limitation was restricted. In *Auchincloss v Auchincloss* L.R. (1930) P. 217 a Russian marriage was held valid, at that time the Russian law permitted a marriage to be terminated at the will of either party. And see the interesting arguments advanced by Mr Nagub in *R. Nagub*, L.R. (1917) 1 K.B. 359 in which he pleaded that he was not guilty of bigamy. Mr Nagub contracted three marriages in succession, he first married one X, an Egyptian woman in Egypt according to the local rites, then he married one Y in England during the lifetime of X, he subsequently divorced X and finally married Z, an Englishwoman in England while X and Y both were alive. He was indicted for bigamy in marrying Z. See *Mangrulkar v Mangrulkar* (1939).

2 See the *Sinha Peerage case*, (1946) 1 All E.R. 397 *Baundal v Baundal*, (1945) 2 All E.R. 374, *Srinivasan v Srinivasan* (1945) 2 All E.R. 21 *Mehata v Mehata* (1945) 2 All E.R. 690.

3 *Mangrulkar v Mangrulkar* (1939) *R v Superintendent of Marriage*, L.R. (1917) 1 K.B. 634 in this case an Indian Muslim who has married an Englishman in England effected the divorce of her wife was sending her a written *talaqnama*. The Court refused to recognize this form of divorce and held that the divorce has not been effected. *Lebrun v Chakravarti* (1929).

4 — See *Cheshire Private International Law* (2nd Ed.), p. 409, *Beckett*, 48 *Lancet Quarterly Review* 361.

5 *Chetty v Chetty* L.R. (1909) P. 67, *Mehata v Mehata*, (1945) 2 All E.R. 690.

6 L.R. (1909) P. 67.

7. (1945) 2 All E.R. 690.

the Court took over the jurisdiction without bothering about any rule which denied it jurisdiction. Mr Justice Bernard observed that he was not in the least troubled by the fact that the marriage took place outside the jurisdiction of the Court, nor was he troubled by the fact that the respondent was at all times domiciled in India. He held that, according to the law as it was then settled and as it had always stood, the fact that the petitioner was at all material times domiciled in England gave the Court jurisdiction to deal, so far as the question of nullity was concerned, with the marriage she went through with the respondent¹. Probably, justice was done in the present case. But unfortunately the English Courts have not shown that much readiness to do justice in other cases, otherwise the problem of polygamous marriages would not have been so complicated in Private International Law as it is at present.

The real nature of the problem may be illustrated from the following cases.

A German Case—In this case a Tennessee promissory note was sued upon in a German Court. At the time of the suit the German period of limitation had expired, though the Tennessee period had not expired. The Reichsgericht held that neither of the periods was applicable—the Tennessee period was held not applicable because the Tennessee law characterized limitation as procedural, and no rule of procedural law of a foreign country could be under the rules of the German Private International Law, made applicable, and the German period of limitation was held not applicable for the limitation was characterized as substantive by the German Private International Law—the substantive law applicable in the present case being the Tennessee law. The case went in favour of the plaintiff. The result was that the promissory note was exempted from the application of both the laws².

A French Case—In this case the widow claimed a share in her husband's property situated in Algiers. The husband died domiciled in Algiers. The parties at the time of their marriage were domiciled in Malta.

Under the French Private International Law, succession to immovables was governed by the *lex rei sitae*, and the right of husband and wife to property arising out of, what was in French law known as '*regime des biens entre époux*' was governed by the law of the matrimonial domicile, i.e., in absence of a contract, the law of the country where the couple intended to establish themselves at the time of the marriage. Under the French municipal law, as then existing, the wife was not entitled to any share in her husband's property, though she was, under it, entitled to half a share in the property acquired in common by husband and wife—'*regime des biens*'. But in this case the '*regime des biens*' was governed by the Maltese Law—the Maltese law gave the widow half of the common property, and a right of survivorship in one quarter of the assets left by the husband.

The question at issue in the present case was whether the widow was entitled to a quarter share in the assets left by the husband?

The difference of characterization between the two laws was that according to one the widow's claim to the land raised a question of succession, while according to the other it raised a question of matrimonial property.

¹ (1945) 2 All E.R. 690

² Reichsgericht 21st November 1910 quoted by Nussbaum p. 83, *see* the American case *Mann v. Garrison*

The French Court held that the Maltese law applied and therefore the claim of the widow was upheld ¹

An English Case—In this case, Mrs Cohn and Mrs Oppenheimer, mother and daughter, who were German nationals domiciled in Germany though resident in England, died in an air crash in London. It could not be proved who survived the other.

Mrs Oppenheimer was entitled to the property under Mr Cohn's will provided she survived Mrs Cohn.

The English and German laws differed as to the presumption under such circumstances. Under the former law the presumption was that the junior in age survived the senior, while under the latter the presumption was that they died simultaneously.

Upon the counsel for the persons interested in Mrs Oppenheimer's property saying that the first question to be determined by the Court was whether or not Mrs Oppenheimer survived Mrs Cohn and that since that was not certain and since the matter of proof was determined by the *lex fori*, the English rule of presumption applied, Mr. Justice Uthwatt said that the question was not 'did or did not Mrs Oppenheimer survive Mrs Cohn?' but 'is the administration of Mrs Cohn's property to proceed on the footing that Mrs Oppenheimer survived Mrs Cohn or on the footing that she did not?' On this basis his Lordship held that the law of domicile applied, under which Mrs Cohn's relatives were entitled to the property ².

From the above illustrations it would come in clear relief that the problem of characterization is a very vital problem of Private International Law, whose solution would put this branch of law on very smooth roads and would lead to the solution of many complications which have crept into this branch of law. This fact remains even if it is admitted that not in all cases of conflict of laws the problem of characterization presents itself in very acute form and that cases in which grotesque and socially undesirable results have been arrived at are not many.

The problem of characterization was first stated by Franz Kahn in 1891, and subsequently, in 1897, it was more amply discussed by the French writer, Bartin, in a monograph intitled, 'the Impossibility of Arriving at a Definite Suppression of the Conflict of Laws', which has, ever since, become a classic statement of the problem.

Since then much has been written on the problem. The problem was first introduced to English readers by Beckett³, in 1934, and to American readers by Lorenzen⁴, in 1920. Dicey⁵, Cheshire⁶, Falconbridge⁷, Martin Wolf⁸,

1 This case is commonly known as the *Maltese marriage case* and it has been discussed almost by all writers on the subject.

2 *In re Cohn* L.R. (1943) Ch 5.

3 Beckett *Classification in Private International Law* B.Y.I.L. (1934) p 46.

4 The Theory of Classification in Conflict of Laws p 80 and the qualification, Classification, or Characterization Problem in the Conflict of Laws, p 115.

5 Conflict of Laws, p 62.

6 The Consecutive Stages in a Private International Law Case, Private International Law, p 83.

7 Characterization, in the Conflict of Laws, 1937 *Law Quarterly Review*, p 235.

8 "The Classification of Legal Rules and Institutions", Private International Law, p 146.

Morris¹, Robertson², Schmitoff³, are some of the other leading writers on the subject. In this paper the writer has no intention of reviewing all the existing literature on the subject, his attempt is a modest one, to give a brief review of the problem, of various theories and a few suggestions of his own.

As may be obvious from the above, 'the problem of characterization arises from the fact that the legal concepts express or implicit in different systems of law may vary from country to country. The differences in legal concepts are sometimes peculiarly complicated and subtle. They may arise from the mere fact that different languages prevail in different countries, so that a word in one language is only approximately equivalent to the supposedly corresponding word in another language or even that two supposedly corresponding words express fundamentally different ideas. Apart from mere differences in language, there may exist fundamentally different legal concepts which are accidental or arbitrary but are products of the whole historical development of different systems of law. These differences in legal concepts are especially likely to manifest themselves in differences in the management and divisions of the law. A scheme of arrangement or division of rules of law presupposes a classification of the legal relations, institutions, interests or things to which the law relates, and in some cases a matter may be sufficiently characterized when it is assigned to its appropriate place in a legal system.'

In the words of another writer

'In every case which involves a question of Private International Law the Court is called upon to decide whether a given state of fact, or a rule of law and the right resulting therefrom falls into one or other of these conceptions of categories of analytical jurisprudence, it is this process—involved in every case—which I describe by the English word 'classification' and which in French legal literature is described by the word 'qualification'.'

"Characterization as such is a most familiar incident of legal analysis, e.g., in deciding whether a certain transaction constitutes a trust or contract. Any subsumption of facts under legal concepts, or of legal concepts under broader categories, can be called qualification or characterization."

The problem, it is submitted, may be presented as follows

Suppose, a Court is called upon to decide a case involving some foreign element or elements. Assuming that the Court has jurisdiction, the Court can, obviously, apply one of the two or three laws involved in the case. the law of the forum may be applied, or the *lex causae* may be applied or the law of some other country may be applied.

It is likely that one law may consider the issue involved as question of procedure, the other law may consider it as involving a question of substance, one law may consider as tort, another a contract, and so on. Because of this diversity, on the

1 Deacy Conflict of Laws (6th Edition), the Problem of Characterization, p. 6.

2 Robertson Characterization in the Conflict of Laws

3 'Vested Rights', English Conflict of Laws p. 31

4 Falconbridge loc. op. cit., p. 241

5 Beckett, loc. op. cit., p. 46

6 Nunbaum - Principles of Private International Law, 'Qualification', p. 79 at 81

application of one system of law one set of rules will be applied, on the application of another system another set of rules will be applied

The first question, therefore, to be determined is whether the characterization of the factual situation, legal relation, obligation, institution, thing or interest in thing, has to be made on the basis of the *lex fori* or the *lex causae* or the law of a third country

Once the first question, or the first step, is determined, it has to be linked to some system of law. Or the question is in reference to what law, 'the legal relation' is to be determined? For instance, a choice of law rule of the forum may determine the legal relation by reference to the *lex domicilii*, or the *lex loci contractus*, or the *lex situs*. The terms, '*lex domicilii*', '*lex loci contractus*' and '*lex situs*' are here connecting factors. The next stage, therefore, is the determination of the connecting factor. The connecting factor connects the legal relation with a particular country. The problem of the connecting factor may become complicated due to the fact that the connecting factor of the two laws may be different, or though it may be same, yet different meanings may be attached to it by different laws. And here the problem of *renvoi* may also be involved.

Lastly, the Court has to apply the law of the country directed by the connecting factor and to determine what legal consequences result from that legal relation or factual situation. Here also the problem might get complicated the question may be what is precisely the meaning of the 'law of the country?' Whether it relates to procedure or substance, or whether it relates to intrinsic validity or to extrinsic validity. It may further be complicated when the Court decides that the law of a country will be applicable, what does it mean? Whether it means the municipal law of the country or whether it means the entire law of the country, including the rules of Private International Law? This may again involve the doctrine of *renvoi*.

Further the problem may also get complicated due to the conflict between the conflict rules of different countries. A conflict between conflict rules may arise because the subject or question or factual situation, etc., are characterized differently in two countries, it may also arise because the connecting factor is characterised in one way in one country in different way in other country, or because the conflict rules of two countries refer to different connecting factors.

At least four theories have been propounded for the solution of the problem of characterization. They are

- (a) Characterization should be governed by the *lex fori*
- (b) Characterization should be governed by the *lex causae*

(c) Characterization should be made by making a distinction between primary characterization and secondary characterization, the former should be governed by the *lex fori* and the latter by the *lex causae*, though in some cases the *lex fori* might be applied even in the case of the secondary characterization.

(d) Characterization should be made on the basis of comparative law and analytical jurisprudence.

III —THEORIES OF CHARACTERIZATION

For solving the problem of characterization, various theories have been suggested, on the application of each theory different results might be arrived at. In this part of the paper the present writer proposes to give a brief review of these theories

Characterization on the basis of lex fori —When Bartin wrote his famous monograph it was the hey day of Law of Nations theory in private international law. After elaborately discussing the problem, he came to the conclusion that in this field it is almost impossible to arrive at any conclusion on the basis of rules of Law of Nations, for the simple reason that there are no such rules, and therefore, in all cases (almost all cases for he recognized a few exceptions), the problem of characterization has got to be determined on the basis of the *lex fori*. This formulation not only gave a heavy blow to the internationalists in private international law, but also brought the problem to the fore.¹

On the basis of Bartin's formulation, the problem can be solved on the basis of the following two rules

(a) When a Court deals with the question of characterization, it must invariably (subject to a few exceptions) apply and decide the issue on the basis of rules of internal law. Where the Court is called upon to decide a rule of foreign law, an institution a legal relationship or some factual situation of a foreign country, it must determine it on the basis of the characterization made in its internal law, provided there exists such a corresponding rule, institution, legal relationship or factual situation. In case it is not so, then it must determine on the basis of the most closest analogy available in its internal law.

(b) Once the Court has determined that the law applicable is of some foreign country, then the Court should apply the law of the foreign country as it is applied in that country and it may also adopt any subsidiary characterization as has been suggested by the law of the foreign country.²

The basis of this formulation is as follows. Bartin starts on the fundamental assumption that the basis for the application of foreign law is that the sovereign in so doing voluntarily restricts its own sovereignty, therefore, when an internal Court is seized of a case, the extent of this limitation, by its very nature, has to be determined on the basis of internal law of the forum. Since the basis is voluntary limitation, no foreign law can dictate or determine that this is the limitation, nor can it suggest that a factual situation, or a juridical relationship belongs to, or does not belong to, such and such category. If it will not be so, then it will be the foreign law which will rule and the law of the sovereign will be relegated to an inferior status and also it will in case the factual situation or juridical relationship is given a wider meaning result in imposing a wider obligation which the forum might not like to accept.

On the basis of this theory, the law of forum will be applicable in those cases also where the case has no relationship with the law of forum except that it has been adjudicated upon in the Court of the forum, and the foreign country or countries characterise it differently, and this will be done notwithstanding the fact whether

¹ Arminjon, M. Pilet, and Noboyet are the writers who have adopted Bartin's formulation.

² See illustrations given by Beckett at p. 52.

or not there is any agreement between the foreign and internal characterizations. Why Bartin reached this conclusion has been very aptly summed up by Lorenzen. The system of the qualifications of the law of the forum is the necessary complement of the system of private international law which the law of the forum has adopted. Both are expressions of its ideas concerning its own sovereignty and the limitation thereon which it feels bound to admit. As there is no authority other than that of the State which has power to define the sovereignty of such State and the extent to which the international community of nations limits its sovereignty and its laws enacted thereunder, each State is invested in the nature of things with the power to fix the extent itself, and in doing so it draws its inspiration necessarily not from the arbitrary counsels of comity but from the idea it entertains of sovereignty in general, including its own sovereignty. This notion of sovereignty on which the system of private international law rests together with its system of qualifications, which is the necessary complement thereto, is the expression of its conception of the requirement of international justice. It follows, therefore, that it must apply the same notion of, and everything depending thereon, to other States as well as to itself.¹ Since, on the basis of Bartin's formulation, the rules of private international law and internal law are parts of the same system, there is a definite inter-relation between the two, and both are to be interpreted in relation to each other.

Besides the theoretical consideration of the theory, Bartin has given some other practical reasons for the application of the rules of the forum. When a judge is called upon to determine a particular issue, he, being trained in the laws of the forum, cannot but decide the issue on the basis of the rules of the forum, for him the determination of the issue on the basis of some other law would mean groping in darkness and it can happen that most undesirable results might be arrived at. Before the determination of the law which is to be applicable, the question of characterization has to be answered; therefore, by its very nature the issue has got to be determined on the basis of the law of the forum. And when the issue can be determined on the basis of either of the two foreign laws, and there cannot be any valid reason why one of them should be applied, it will be best to apply the law of the forum.

According to the views of Bartin characterization is to be made on the basis of the law of the forum, to this he recognized two exceptions.

(i) In respect to the characterization of property as movable or immovable the law of the situs should be applied. This is so because, according to him, it would best subserve the security of the transaction affecting property, and not because the law of situs can be given sovereign authority.

(ii) In those cases where contracts are entered into by correspondence, the *lex loci contractus* would be determined by reference to that law which would postpone its formation longest, this is based on the same principle on which the first exception is based.

This theory has been accepted by some other writers², with minor criticism. On the other hand it has been vigorously criticised by others. Here the writer proposes to give a summary of the criticisms given by Wolf and Beckett.

1 Lorenzen "Selected Articles on Conflict of Laws", p. 92

2 The other writers are Buzzati Dena Khan. Lorenzen has very brilliantly summed up their views. Originally Buzzati agreed with Bartin only to the extent of holding that the determi-

Bartın based his theory on French jurisprudence. Beckett asserts that in none of the French decisions, referred to by Bartın, the French Courts have expressly classified a rule of foreign law on the basis of the French internal law, rather in some cases it appears that the Courts have, either expressly or implicitly, applied the foreign characterisation.¹

A universal application of this theory would result in the application of neither the law of the forum nor the *lex causae*, but of the law which is neither "A logical application of the theory would result in an English Court, through classifying a French rule in a manner different from that in which it is classified in its country of origin, not merely refusing to apply French law when according to French ideas it should be applied, but also applying French law in cases where, according to French ideas, that law is not applicable at all."² This can be supported purely on logical basis but it is so repugnant to commonsense that few Courts have ever consistently applied it, and wherever the Courts have applied it, they have to avoid the absurd position to which it leads, fallen back on the doctrine of *renvoi*.³ And the application of the doctrine of *renvoi* goes against the logical basis of this theory.

This theory also leads to most undesirable results where there is no close analogy between the rules of forum and rules of foreign countries, and it also sometimes fails and leads to absurd results where there is such an analogy possible.

Where there is no similar and identical rule to the foreign rule calling for characterization, the theory entirely fails, and this is not only on the theoretical grounds but on practical basis, for there are many institutions in many civilized countries which are of variegated nature and differ from country to country. For

nation of domicile and perhaps certain other points of contact must be governed by the law of the forum. As regards the other problems he felt that the cases discussed by Bartın resulted not so much from a difference in the laws of the different countries as from an erroneous interpretation and application of such laws. Buzzati has however modified his opinions since the time of the publication of his original articles on the subject so that his views coincide to-day more nearly with those expressed by Bartın.⁴ p. 93

Lorenzen has summed up the views of Diena thus: "Where the conflict in qualification is between the law of the forum and that of a foreign system Diena would agree with Bartın's conclusion. But where the only connection of the case with the law of the forum is the fact that the suit is brought there Diena would apply the qualification of the law of the forum whenever the foreign systems agree among themselves on the qualification of the legal transaction. In this case he would accept the common foreign qualification." p. 93

"Khan dealt with most of the problems a considerable time before Bartın advanced his theory of qualification. Under the head of 'Collisions in the Point of Contact' he included nationality, domicile, *lex loci contractus*, *lex loci solutionis*, *lex loci delicti* and the question of movable and immovable property. Other cases in which there is a difference in the qualification of juridical relations or institutions he discussed under the heading of 'Latent Conflict of Laws'. With respect to both classes of problems Khan held that the law of the forum was alone competent to define the particular institution, relationship or legal concept. He found it impossible, however, to apply this principle to the case of double nationality when the law of the forum is disinterested. In this case he would abandon the rule of nationality and substitute for it that of domicile." p. 94

¹ Beckett, p. 54. Wolf p. 152. According to Wolf, "Bartın emphasizes that the rules of conflict of laws and those of internal law of a given country form part of the same legal system and that the legal conceptions of this system are the basis of the juridical training of both the judges and the law giver. This is true and it explains why in formulating rules of conflict of laws the legislator and the Courts use the terminology developed in internal law. This community of terms allows us to assume that a term such as form or inheritance, used by a conflict rule, has probably the same meaning as in internal law, provided that the conflict rule merely delimits the area of application of the internal law of the country. But that does not help us much. It does not furnish any answer to the question which rules of foreign law belong to which category. It does not justify the bringing of an institution of foreign internal law into the domain of a particular conflict rule of the forum in cases where the foreign institution is similar to an institution of the internal law of the forum." . . .

² *Ibid*

³ See Part IV of this paper.

instance, the French law recognizes an institution which is known as '*regime des biens*' to which there is no close analogy in English law. The nearest possible English institution to this the regime between husband and wife—is the one under which whole of the property of wife is vested in the husband and none of his is vested in the wife¹, but fact of the matter is that there is no analogy between the two, rather they are dynamically opposite to each other—one system recognizes a community of property between husband and wife, while the other vests all the wife's property in the husband and gives her nothing in return. Can it be determined on the basis of English internal law? The answer supplied by Bartin is when the foreign rule or institution is so alien to the idea of the forum as to deny any analogy with any rule or institution of the forum, then the judge would have to refuse to apply it on the ground of public policy. Sometimes the judges of the forum do follow that, but if that is made the rule, then, it is submitted, more often than not many an institution of foreign origin would not simply be recognised merely because there is no possible analogy between the foreign rule and rule of the forum, and would therefore lead not only to the denial of justice but also to the repudiation of the very purpose of private international law.

It is fortunate that in no country the Courts have accepted Bartin's formulation so logically as they would have done had they been the followers of Bartin.

Sometimes though there is available a close analogy between a foreign rule and a rule of the forum, yet that is merely apparently so, there is in fact no analogy between the two consequently it leads to most undesirable results. For instance, as regards the marriage of minors both the English and French internal laws provide that the consent of the parents should be obtained. And the analogy ends here. Under English law a marriage performed by a minor without the consent of the parents outside the jurisdiction of the forum would be valid, but it is not so under the French law. Under French law if it is so performed, it can be declared null and void by the Courts on the appropriate proceeding being brought. The English law characterises this rule as referring to extrinsic validity of marriage, therefore being governed by *lex loci celebrationis*, while the French law considers it as a matter relating to intrinsic validity of marriage, and therefore being governed by the law of nationality. But according to Bartin's theory the French rule of consent would be characterised by an English Court as concerning formality, because that is so under English internal law. This obviously results in most undesirable result².

Therefore, the most serious objection to this theory is that it leads to the indulgences in mechanical jurisprudence, where only justification possible is on logistic grounds, while, in practice, it leads to most undesirable results and puts the whole issue in such a vicious circle from which it is sometimes not possible to extricate. It not only leads to distortion of foreign law but also to socially most undesirable results, and it breaks down totally where there is no analogy to the foreign rule or institution in the internal law of the forum.

¹ This was the law prior to the Married Women's Property Act 1882.

² It was so held in *Ogden v Ogden* but happily it has found all round condemnation by writers, jurists and judges.

THE THEORY OF CHARACTERIZATION ON THE BASIS OF *LEX CAUSAE*.

In opposition to Bartin's theory is the theory advanced by Despagnet and Martin Wolf who preach characterization on the basis of the *lex causae*. According to Wolf

"every legal rule takes its classification from the legal system to which it belongs. French law classifies French legal rules, Italian law Italian rules, and an English Court examining the applicability of French rules will have to take the French classification into consideration. Of course, an English rule on conflict of laws can either expressly or implicitly forbid the Court to accept the foreign classification. Such exclusion may be based, for example, on principles of justice or morality. But this will be a rare exception. To examine the applicability of foreign law without reference to its classification is to fail to look at foreign law at all. Bartin and his followers shut their eyes to good portraits and rest satisfied with a collection of caricatures."¹

According to Despagnet the characterization should be based on the *lex causae*. His views have been thus summed up by Lorenzen. When a judge, drawing inspiration from his own law and the principles of private international law, decides that a foreign law should be applied to a particular juridical relationship, he must be understood as applying such law so far as it organizes and regulates such relationship. Now the first point that attracts the attention of the legislator and the first thing determined by him is the nature or qualification of the relationship which he regulates. To disregard his decision in this respect is tantamount to a non-application of the law to which the juridical relationship in question was on principle subject. If the national law has made a certain question one of capacity, can it be said that if the question is converted into one of form by the law of the forum the law which should govern the capacity of the individuals has been applied? No! the very principle has been violated. What is of capital importance and what produces all subsequent juridical consequences is precisely the qualification to be given to a juridical relationship and it is flagrant contradiction in fact to import the qualification of the forum and at the same time to pretend that one is following the foreign law.²

Some modification of this view has also been adopted by some writers.³

¹ Wolf, p. 155

² Lorenzen p. 94

³ Lorenzen p. 95. The other writers are Gamma and Jitta. According to Gamma, "The principles of the conflict of laws should be deduced from the function of the State and of the judge, but the norms for a State and judge should be deduced on the basis of the conflict of laws. Gamma would separate the juridical relations and institutions from the positive legislations of the various States, so that their function may be considered without bias with reference to the requirements of internal life. The judge should, therefore, appreciate the qualification of legal transactions solely with reference to that law which is most favourable to the development of the relationship itself in its extra territorial aspect. According to Gamma the will of a Dutch subject executed in the holographic form in a country in which such wills are permitted should be recognized by the Courts of other countries, not because the law of the forum regards the question as one of form (Bartin), nor because the national law governing in the system of the conflict of laws, for the forum regards it as a question of capacity (Despagnet) but because a proper international order requires that persons abroad should be able to execute wills in as simple a form as possible and the holographic will best answers the requirement. The Judge should have in mind the international principles and those of the forum. Otherwise a real system of private international law can never be built up."

Jitta rejects "all mechanical application of the *lex fori*, the *lex domicilii*, the *lex rei sitae*, the *lex loci contractus* etc., and enquires always what are reasonable requirements of international social life in the particular case. If a juridical relationship belongs to a particular local sphere he will apply the

This view bristles with difficulties ¹

Cheshire, speaking on this theory, said "If the law which is finally to regulate the matter (*i.e.*, the *lex causae*) depends upon classification, how can a classification be made according to that law?"² Wolf denying that it is being caught in a vicious circle asserts

"In my opinion the criticism does not hold good, but is based merely on the peculiar way in which conflict rules are framed. To give examples 'The effect of marriage on the property of spouses is governed by the law of their matrimonial domicile' More correctly phrased this rule will run thus 'If two persons are married to each other the Court has to apply all those rules operative at their first matrimonial domicile which according to the law there prevailing regulate the effects of marriage on the property of spouses'."³

It is submitted that this does not go to refute the argument that it does lead in a vicious circle and in many cases it may not be possible to arrive at a sociably desirable result. It also does not explain, in those cases where two foreign laws may equally be applicable, why one law should be accepted and the other rejected.⁴

Lorenzen has summed up the criticism of this theory as follows

"It (Despagnet's theory) manifestly begs the entire question. The qualification of a legal transaction cannot, in the nature of things, be determined by the law governing the transaction itself, inasmuch as the problem of qualifications, is limited to the cases where the application of the foreign law depends upon the determination of the preliminary question. Under these circumstances it is impossible to decide the preliminary question by the law governing the transaction itself."⁵

THE THEORY OF TWO-FOLD CHARACTERIZATION

Some writers hold the view that the problem can best be solved by dividing the process of characterization into

- (i) Primary characterization, and
- (ii) Secondary characterization

The former is the matter for the *lex fori* and the latter for the *lex causae*

According to Cheshire, the primary classification is "that process by which the juridical nature of the question requiring a decision is determined"⁶ It

law of that sphere including its qualification. The question whether property is movable or immovable or whether a particular individual is a trader would be decided, therefore, in accordance with this principle by the law of the *forum* or by the law of the place where the business was carried on. If the juridical relationship to international social life, as for example a contract having direct connection with several countries or States, the rule to be applied would be the international common rule, if such can be found and if none exists the reasonable principles of international social life. It is apparent that in a system like this the conflict of qualifications presents no special problem and coincides in all cases with the general problem of choice of law.

¹ Dicey (6th Ed.) p. 6,

² Cheshire p. 34. Morris in Dicey's Conflict of Laws (6th Ed.) thus sums up the criticism "In the first place it is arguing in a circle to say that the foreign law governs the process of characterization before the process of characterization has led to the selection of the appropriate law. Secondly, if there are two potentially applicable foreign laws why should the forum adopt the characterization of one rather than that of the other?" p. 67.

³ Wolf p. 156 and also see illustrations given by him on pp. 156-160.

⁴ See Beckett at p. 58 where he has given a few examples to show the unworkability of the theory.

⁵ Lorenzen p. 113.

⁶ Cheshire, p. 63.

is the 'allocation of the factual situation to its correct legal category', or the 'subsumption of facts under categories of law'¹ According to Cheshire and Robertson the primary classification is made on the basis of the *lex fori* Cheshire says "The question cannot be submitted to the *lex causae*, for the *lex causae* is unknown until the process of primary classification is complete"² The term *lex fori* has been used in a wider sense by these writers, it does not mean the domestic rules of the forum but the rules of conflict of laws, as Robertson puts it

"The various legal categories, into one of which the judge must decide that the question falls before he can select his conflicts rule, must be wider than the categories of the internal law, because otherwise the judge in a conflicts question will be unable to make provision for any rule or institution of foreign law which does not find its counterpart in his own internal law, and thus one of the reasons for the existence of the science of conflict of laws will be defeated"³

To the rule that the primary characterization should be made on the basis of the *lex fori* these writers recognise two exceptions

(a) The question whether things or interests in things are movable or immovable is a question for the *lex situs*, and

(b) If there are two potentially applicable foreign laws and their characterizations agree, the forum should adopt their common characterization

The secondary characterization is the 'delimitation and application of the proper law'⁴ The difference between the primary classification and the secondary classification is that the former precedes and the latter follows⁵

According to Robertson and Cheshire the secondary characterisation is governed by the *lex causae* But the conflict of procedural rules is governed by the *lex fori* This means that the procedural rules of the forum are invariably followed and the procedural rules of the *lex causae* are invariably excluded, though Cheshire hold the view that whether or not a matter is procedural is, in the stage of secondary characterization, to be governed by the rules of *lex causae* and that here, as in the case of primary characterization it is not necessary that the domestic classification should be followed, rather it should be classification of Private International Law⁶

Cheshire has sub-divided the discussion of secondary characterization into two

(a) Cases where there is only one *lex causae*, and

(b) cases where there is more than one *lex causae*

In the former the secondary characterization is to be made on the basis of the *lex causae* According to Cheshire

"Once it has been established that by the Private International Law of England a foreign legal system is the appropriate law to govern the whole of a particular
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1 Robertson pp 63 64

2 Cheshire p 64

3 Robertson, p 33

According to Cheshire A foreign rule or institution may be repudiated on the ground of its repugnance to public policy as understood in England but it must not be disregarded merely because it is alien in nature to the conceptions of English municipal law, p 66 Then by citing *DeNicols v Curlier* and *In re Berchtold*, he proceeds to show that this has been accepted by the English courts

4 Robertson p 118

5 Dicey p 68 Cheshire pp 72-85

6 This has been illustrated by Cheshire from the construction given by the Courts to the Statute of Fraud and the Statute of Limitation

transaction, it seems only rational to admit that the particular view which that law holds with regard to the character of its own domestic rules must also be applied"¹

In the latter case, where there are more than one *lex causae*, the characterization is governed by the *lex fori*²

This theory of two-fold characterization has been vigorously criticized by Morris and Lorenzen, as artificial and unreal and too mechanical. Not only is there difference of opinion between the writers as to where the line between the primary and secondary characterization is to be drawn—Cheshire classifies the same thing under primary characterization, while Robertson characterizes the same things under secondary classification³ but it also leads to by expending the sphere of secondary characterization, 'all difficulties inherent in the doctrine of *renvoi*'⁴

The uselessness of this theory has been further illustrated by Morris from the following illustration. Suppose the validity of a marriage performed at a London Registry Office between an English woman and Greek national domiciled in Greece is challenged before an English Court. Suppose that the Greek law would not recognize a marriage, where one of the parties is a Greek, unless an Orthodox priest is present at the ceremony. If according to this theory both the formalities and the capacity to marry are considered to be matters of secondary characterization, then both would be governed by the Greek law. If the Greek law characterizes them as matters relating to intrinsic validity of marriage, then the English Court will be obliged to hold the marriage as null and void, notwithstanding the English rule of Private International law that formalities of marriage are governed by the *lex loci celebrationis*. Upon this result, Morris observes 'It is inconceivable that an English Court would come to any such conclusion'⁵

On the basis of this theory, Lorenzen asserts, it can happen that a transaction which is not valid either by the *lex fori* or by the *lex causae* will be held valid. This has been illustrated by him from the following example. According to these writers (Cheshire and Robertson), if the law of the forum has decided that a contract or a tort is governed by the law of the state *X* and no rules of procedure of the forum are involved, such questions as whether a writing required by the law of state *X* affects the formation and validity of the contract or relates to evidence, whether by the law of *X* the running of the statute of limitations discharges a contract or merely bars the remedy for its breach, whether the failure to give notice to the wrongdoer required by the law of state *X* will discharge the cause of action or whether it is merely a procedural requirement for the bringing of the suit, should be governed by the law of State *X*. What are the consequences of this view? According to the proponents of the secondary classification theory, if the law of the

1 Cheshire p 79

2 According to Robertson secondary characterization should be performed by the proper law already shown as applicable to the question which has to be characterized. This formulation has been criticised by Cheshire as coming 'perilously near to a *petitio principii*'. The question to be classified is whether a certain rule is substantial or formal. If the rule is classified as substantial French law is the proper law otherwise English law governs. Why therefore, should the actual classification be left to the one law rather than to the other? p 82

3 The characterization of the parental consent according to Cheshire is a matter to be governed by Primary Characterization while according to Robertson it is matter to be governed by secondary characterization

4 Dicey (6th Ed) p 69. See Part V of this paper

5 Dicey, p 69.

forum says that the Statute of Limitations is substantive and the law governing the contract says it is procedural, the action will be maintainable, even though it is not brought within the time limit prescribed by either law.¹ Cheshire has answered this criticism by saying that the Court of the forum "is not necessarily prejudiced from saying that the statute in question ought to be characterized as substantive" for the purpose of its own conflict of laws rule.² To this Morris remarks that "this suggestion admits that the *lex fori* controls the characterization of the statute of X (*lex causae*), and this involves complete abandonment of the principle that secondary characterization is a matter for the *lex causae*."³

As to the subdivision made by Cheshire of the secondary classification, Morris observes "This distinction needlessly adds to the complexities of the problem, and it is based upon a misconception. Cases in the Conflict of Laws always involve more than one *lex causae* and if these are the only cases dealt with by the Conflict of Laws it follows that Cheshire in substance abandoned the principle that secondary characterization is a matter for the *lex causae*. It would seem to follow that the distinction between primary and secondary characterization should also be abandoned because it no longer has any significance."⁴

THE THEORY OF CHARACTERIZATION ON THE BASIS OF COMPARATIVE LAW

Rabel and Beckett have maintained that characterization should be governed by the analytical jurisprudence on the basis of comparative study.

Starting with the assumption that "rules of Private International Law are rules to enable the judge to decide questions as between different systems of internal law—either between his own internal law and a given foreign law or between two foreign systems of law" and therefore these rules "if they are to perform the function for which they are designed, must be such, and must be applied in such manner, as to render them suitable for appreciating the character of rules and institutions of all legal system" and as the "classification is simply an interpretation or application of the rules of Private International Law in a concrete case and the conception of these rules must, therefore, be conception of an absolutely general character", Beckett says that "these conceptions are borrowed from analytical jurisprudence, that general science of law, based on the results of the study of comparative law which extracts from this study essential general principles of professedly universal application—not principles based on, or applicable to, the legal system of one country only". Therefore, Beckett asserts that "classification must be based on analytical jurisprudence."⁵

Further Beckett considers the problem by dividing the cases concerning the problem into three classes

- (i) Cases not involving any characterization of a rule or institution of internal law,
- (ii) Characterization of rules or institutions of the internal law of the forum, and
- (iii) Characterization of rules or institutions of the foreign internal law

1 Lorenzen p. 133

2 Cheshire p. 84, quoting Cook

3 Dicey p. 70

4 Dicey pp. 70-71

5 Beckett, p. 59, see Rabel *The Conflict of Laws, a Comparative Study*, Vol. I

In the first class of cases, Beckett holds, the characterization would be governed by the *lex fori*. "The only exception which can be made is where it is clear that upon the application of any conception the Courts of law of one of two foreign countries must be competent and the two foreign laws are in agreement in following that a conception different from that of the *lex fori*, and in these circumstances a Court might in effect, if not in form, adopt foreign conception by the application of a principle analogous to that of the *renvoi*"¹

As regards the second class of cases, Beckett says "In most cases the Court will simply be applying the rules—statutory or Common Law—of its internal law, in order to determine their application, its ordinary principles of Private International Law which can in this connection only be interpreted in the light of general jurisprudence"²

In respect to the third class of cases Beckett observes that it is essential that "the Court should not merely ascertain the purport of this rule as a rule of internal law, but also that it should ascertain in what circumstances it is applied by the Courts of the country of whose legal system it forms part. It is only when in possession of this information that a Court is in a position to classify the foreign rules or institutions. On the basis of this information, the Court should classify it according to the conceptions of analytical jurisprudence"³

The above view has been supported by Morris in these words "This view is attractive, because it is free from the formidable objections and because it envisages one test for every case"⁴

But other writers have criticised it. Thus according to Falconbridge

"It would seem that characterization on the basis of comparative law, notwithstanding the benediction thus given to it by two English writers, must be regarded as a theoretical, and not a practical, method of characterization in English conflict of laws. It is a course highly desirable, especially in a subject such as conflict of laws, which should be cosmopolitan in its outlook, and which, as compared with other branches of English law, is still in a formative stage, that the judges should attempt to resist the paralyzing influence of the doctrine of *stare decisis*, and should in the light of wider experience in dealing with a variety of conflict problems, and a larger knowledge of the international aspects of conflict theories, reconsider solutions which have sometimes in the past been stated in too general, or even too casual, a manner." But, Falconbridge asserts, "Characterization on the basis of comparative law would seem to require a supernatural class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems"⁵

Cheshire observes "It has been suggested that classification must be based upon analytical jurisprudence, but to solve the problem in this scientific manner, desirable though it may be in theory, is scarcely practicable so long as agreement is lacking upon general jurisprudence principles"⁶

1 Beckett pp 63 64

2 Beckett, p 65

3 Beckett p 72

4 Dicey, p 67

5 Falconbridge, p 245

6 Cheshire, p 65

According to Wolf "this plan is attractive and admirable and there is no doubt that in this line much more could be done than yet has been achieved" But then he goes to point out the practical difficulties in the application of this theory He says that, firstly, there are at present not available exhaustive categories, covering all existing institutions in the world and secondly, even if it becomes possible to invent an "exhaustive system of legal categories—covering all existing institutions in the world and leaving empty compartments to be filled by future institutions—this could hardly be achieved without alteration in the laws themselves

How could the most learned 'analysing jurists' remove such differences of classification without thereby altering the law? For such divergence of classifications is not jurisprudential in character, it connotes a difference in the law ⁴

IV

THE PROCESS OF CHARACTERIZATION IN PRACTICE

In Part II of this paper the present writer has given a summary of the various theories propounded for the solution of the problem of characterization, their criticism has also been given In this part of the paper the writer proposes to give a brief review of the process of characterization, in its different stages, as has been given by the Courts This will bring to the fore the complications which are inherent in the problem and complications which have crept in due to the mechanical approach made by the Courts The present writer holds the view that there is only a slight possibility of minimizing the complications inherent in the problem, though probably an attempt can be made successfully to reach to a sociably desirable result even in these cases, provided the mechanical approach is given up, and that the other complications can be tidied up very neatly by tackling the problem more on social footing than on doctrinal basis

FIRST STAGE *The Characterization of Factual Situation*—When the Court has determined that it has jurisdiction to entertain the case, it is called upon, before it can select the proper rule of choice of law applicable to the situation, to say whether the question refers to contract, torts, succession or property Sometimes it will be easy to place the question in the proper category, but sometimes it might be difficult it is because of the fact that in different systems of law the same question, the same factual situation or the same institution may be characterized differently Under these circumstances the question before the Court is What has it to do under the circumstances? Which categorization has it to accept And on what basis has it to accept a particular categorization and reject the others?

Many writers have suggested that under such a situation there is no alternative to the application of the *lex fori*, while other writers have given some other suggestions The results of this characterization on the basis of the *lex fori*, are too obvious to need mentioning It would lead to different characterizations in different countries, and therefore, different results of the same question will be arrived at in different countries

Unger holds the view that it is sufficient if the case falls within the analytical framework of the legal system of the forum this he illustrates from two English cases, *Re Bonacina*¹ and *Nachimson v Nachimson*² In the former case a contract

¹ Wolf p 154

² LR (1912) 2 Ch 394

³ LR (1930) P 217

unsupported by consideration was held enforceable, while in the latter case, a Russian marriage, though not falling within the English definition of marriage, as it was revocable at will, was given recognition. Robertson considers Unger's formulation rather too narrow, for under it those institutions which are not known to English law will not find recognition in England. This he illustrates by citing the case of *DeNicols v Cunliffe*¹, wherein a French institution unknown to English law was given recognition, and held enforceable, by the House of Lords. Therefore, according to Robertson, in so far as the characterization of foreign legal situations is determined by the *lex fori*, the term does not mean strictly the internal law of the forum, but a wider concept which needs to be worked out for purposes of the conflict of laws. To this conclusion Lorenzen seems in agreement.²

This aspect of the problem, the conflict between the conflict rules of different countries at the first stage, has been more fully discussed by Falconbridge, and the writer proposes to summarize his views in the following pages.

Under the heading, 'Conflict of Characterization: Parental consent to Marriage: Formalities and Capacity', after elaborately discussing the controversial and much criticized case of *Ogden v Ogden*³ Falconbridge opined:

"The English Courts might have held that a requirement of English law should be characterized as part of the formalities, and that it was therefore inapplicable to marriage of English persons celebrated in Scotland or elsewhere outside of England, and, quite consistently, they might have held that a requirement of French law as to parental consent should be characterized as a matter of capacity, and that it was therefore, applicable to a marriage celebrated in England of persons domiciled in France."⁴

Falconbridge proceeds to suggest that in each case the marriage in order to be valid must be extrinsically valid according to the proper law governing formalities and must be a marriage between parties who are capable of marrying each other and must be in other respects intrinsically valid according to the proper law governing capacity and other matters of intrinsic validity.⁵ He proceeds to suggest that if this principle is applied to Barton's hypothetical problem of Hollander's will, a sociably desirable result can be arrived at.

After discussing the cases relating to the distinction between formalities of contract and procedure, between substance (right or obligation) and procedure (remedy), between proprietary rights acquired by the parties to a marriage on the

1 LR (1900) A.C. 21

2 Lorenzen p. 122

3 LR (1908) P. 46. The facts of this case have been given in Part II of this article. Cheshire thinks that the characterization of a requirement as to parental consent occurring in a foreign enactment is a question of construction in all cases.

4 Falconbridge p. 259. Falconbridge however observed that when the latter situation came before the courts in *Simon v Mallace* and *Ogden v Ogden* the Courts failed to make the above distinction.

5 Falconbridge p. 543. After observing that the Courts have more often not discussed the problem Falconbridge gives the following reasons for this: (a) It sometimes happens that there is no possible or probable conflict of characterization and therefore no need to examine the concrete provisions of any foreign law in aid of the characterization of the matter, in this kind of a case a Court may properly decide what law is applicable, before any foreign law is proved and in order to avoid the expenses of the unnecessary proof of foreign law. (b) The categories of the *lex fori* and of a given foreign law may be substantially the same and in that event on the foreign law being proved, either one or two things may happen: (i) an English Court may appear to characterize a given matter in accordance with the *lex fori* without regard to the foreign law, or (ii) an English Judge may appear simply to adopt the characterization of the foreign law without regard to the *lex fori*.

occasion of the marriage or as a result of the marriage and the right of surviving party on the death of the other party, and between administration of the property of a deceased person and succession to his property, Falconbridge says that in this class of cases there would appear no reason for departing from the general rule that the question before the Court should be characterized in accordance with the *lex fori*, and that any provision or rule of a foreign law which may be the proper law under the conflict of laws of the forum should be characterized, in its context in the foreign law, in accordance with the *lex fori*.¹

Further, Falconbridge observes "When the question relates to property in a thing, new considerations arise. The fundamental distinction between a proprietary right in a thing (*jus in re*) and a right relating to a thing (*jus ad rem*) gives rise to a great variety of questions of characterization in a great variety of situations, and the problem of characterization in its particular application to property presents special features, owing chiefly to the fact that proprietary rights in things, as distinguished from rights relating to things, are, as a general rule, governed by the *lex rei sitæ*, and that in many situations this general rule imposes itself imperatively as affording the only practical solution of questions of proprietary rights."²

Similarly, Falconbridge holds that there is a justification for departing from the general rule that the *lex fori* governs characterization in cases which relate to status. According to him "Some confusion has been caused in the conflict of laws by the failure to distinguish between status and incidents of status, and between status and capacity, and it would seem that this confusion may, at least to some extent, be avoided by an exact characterization of the question or questions in issue in any particular situation."³ Then he proceeds to say that the question whether a person has got a certain status is usually governed by the *lex domicilii*, while the question whether a person possesses capacity cannot be answered simply by reference to the law which governs his status, not only this, capacity in a particular transaction may differ from another, for example, capacity to marry is to be characterized as a matter of intrinsic validity of marriage, the capacity to succeed to property is to be characterized as a matter of succession, the capacity to make an ordinary commercial contract is to be characterized as a matter of intrinsic validity of contract, the capacity to make a marriage contract or settlement is to be characterized as a matter of intrinsic validity either of the contract or conveyance, and so on, in brief, in every case the question of capacity must be characterized in connexion with the kind of transaction into which a given person enters or purports or intends to enter.

Lorenzen is of the opinion that the characterization of the same rule of law or institution may be different in the Private International Law from its characterization in internal law. He holds that there should be two distinct tests as regards the same rule of law or institution, one for internal purposes, and the other for questions of Private International Law. "Similarly as regards the qualification of legal transaction the classification or characterization may have to be upon a broader or narrower basis than the internal law of the forum if it is to be suitable for the needs of Conflict of Laws."⁴

¹ Falconbridge, p. 543

² *Ibid*

³ Falconbridge p. 544

⁴ Lorenzen p. 123. In support of his argument Lorenzen quotes two cases - one of the Supreme Court of the United States *Huntington v. Aldred*, 146 U.S. 657, and the other of the Privy Council L.R. (1893) A.C. 150.

SECOND STAGE Characterization of Connecting Factor—When the factual situation, or institution or question has been characterized, the process of characterization enters into the second stage, this enquiry precedes the enquiry as to the proper law applicable to the given situation or question. By ascertaining thus the question or factual situation is connected to the country, or to the law of the country which is considered applicable in the given case. This is why the enquiry in this stage¹ is known as enquiry in respect to the connecting factor. For instance, when the Court, in the first stage of characterization, has come to the conclusion that the factual situation or question relates to succession, contract, or tort, then the Court will be directed by the choice of law rules of the forum to apply the *lex domicilii*, the *lex loci contractus*, the *lex loci solutionis*, or the *lex loci delicti* respectively. The *lex domicilii*, the *lex loci contractus*, the *lex loci solutionis*, the *lex loci delicti* are connecting factors. In some cases the determination of the connecting factor may be very simple, while in others it may present complications, this is so because of the conflict or non agreement as regards the precise meaning of these terms in different countries. The English law recognizes the doctrine of reversion in case of domicile, while the American Law does not, under the American Law, married women can have separate domicile, while under the English law they cannot, under the Anglo-American and Indian laws, a contract is deemed to be concluded, when the letter of acceptance is posted, while under the Russian law a contract is deemed to be concluded only when the letter of acceptance reaches the offeror and so on.² Thus, a conflict of conflict rules may arise in at least, three different ways. If, in two given countries the conflict rules are on their face the same in terms in that the same connecting factors are specified with respect to particular questions of conflict of laws respectively, but in a given factual situation the question before the Court is characterized in one way in one country and in another way in the other country, there may be a latent conflict of conflict rules and the difference in the characterization of the question may result in the use of different connecting factors and consequently the election of different proper laws as applied to the same factual situation. If, on the other hand, different connecting factors are specified in the corresponding conflict rules of two countries with respect to the same type of question, there may be a patent conflict of conflict rules applied in the same factual situation, notwithstanding that the question before the Court is characterized in the same way in both countries.³ The third class of cases are where the conflict rules of two countries are in terms the same in that they both use nominally the same connecting factor with respect to a question which is characterized in the same way in both countries, but nevertheless there may be a latent conflict of conflict rules, because the place element specified as the appropriate connecting factor in the conflict rule of one country may be characterized differently from the place element specified in the corresponding conflict rule of the other country.

1 Falconbridge subdivides the connecting factor into two stages (a) the formulation or selection of a rule of conflict of laws as to the proper law to be applied as for example that the *lex domicilii*, the *lex loci celebrationis* the *lex rei sitae* or as the case may be is the governing law, and (b) the application of the abstract or general rule so formulated or selected to the facts of the case and the consequent concrete or specific designation of the law of a particular country as the proper law.

2 Falconbridge "the selection of the appropriate connecting factor is equivalent to the selection or formulation of the specific conflict rule of the forum appropriate to the subject or question as already characterized" —p 547

3 Falconbridge pp 350-351

Most of the writers¹, are of the opinion that the characterization of the connecting factor should be governed by the *lex fori*, and it has also been supported by the Practice of English and American Courts, though a few writers hold the view that it should be characterized according to the *lex causae*². Cheshire is of the opinion that the characterization of the connecting factor should be made on the basis of the law of the forum "an English Court must assign to the conception, say of domicile, that meaning which it has always borne in English law. To follow any other course would be to abandon the English rule for the choice of Law"³.

Lorenzen says that so far the Anglo-American Courts have characterized the connecting factor by applying the *lex fori*, but whether they would apply the characterization of the *lex causae* in those cases where the forum has no connection with them except as a trial Court, and the characterization of the two foreign countries with which the cases were connected is the same, is doubtful, though he thinks that in such cases the common foreign characterization should be applied, for it would be conducive to international harmony and also there is no inescapable necessity of applying the law of the forum. At the same time, according to Lorenzen, if the connecting factor has significance with the law of the forum as well, then the *lex fori* should necessarily govern though, it should be noted, he does not mean by the *lex fori* the internal law of the forum, but uses it in a wider sense.

Although Robertson also accepts the view that the characterization of the connecting factor should be governed by the *lex fori*, but, as he is inclined to accept the doctrine of *renvoi* it would seem that he would accept the foreign characterization as far, as it is dictated by the doctrine of *renvoi*. He has given the following illustration: An American citizen having a domicile of choice of England, and domicile of origin in Iowa, deciding to give up his English Domicil and to settle in the United States in his remaining days, sails for the United States, but dies in the way. An English Court is called upon to administer his estate. According to the English doctrine of reversion of domicile, the deceased died domiciled in Iowa, while according to the Iowa law he died domiciled in England, for under the Iowa law domicile of choice continues until a new domicile is acquired. Under the doctrine of *renvoi* as established by the case of *In re Annesley*⁴, the English Court is to decide the case in the same way as the judge sitting in the Court of the domicile would decide. On this basis, the Court will have to accept back the reference from the Iowa Law to English law, and thus will have to accept the characterization of the domicile (the connecting factor) by the Iowa Court. In this way the characterization of the connecting factor may be governed by the *lex causae*.

Whether the application of the doctrine of *renvoi* to the connecting factor would be conducive to the solution of the problem has been doubted by some writers⁵.

¹ Falconbridge, Cheshire, Morris, Dicey and others. See Robertson for an elaborate discussion of the Anglo-American cases on the point, also see Schmuthoff, English Conflict of Laws, pp. 46-49, wherein he has discussed some English cases on connecting factor and the conflicting views of Story and Westlake on Capacity as problem of connection. See C. K. Allen, Status and Capacity, 46 *Law Quarterly Review* 277.

² Martin Wolf.

³ Cheshire, p. 71. In re *Watts*, L.R. (1900) p. 211, Landley M.R., observed: "The domicile of the testator must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law".

⁴ L.R. (1926) Ch. 693. For the discussion of the problem, see Part V of this paper.

⁵ Lorenzen, pp. 126-127. See Parts V and VI of this article.

The conflict between conflict rules in this respect has been presented to English Courts in the cases of domicile.

Falconbridge also thinks that it is the *lex fori* which invariably governs the characterization of the connecting factor. This he has illustrated by the cases of domicile (where the English Courts have applied the doctrine of *renvoi*), the *lex loci contractus* and the *lex situs*. After opining that the place of contracting or the place of making of a contract has been widely used as the connecting factor and that there is good deal of conflict in this regard, even between the Anglo American opinions, as for example, the American law—the Conflict of Laws Restatement—considers that even a marriage contract for its validity depends upon the *lex loci celebrationis*, while the English law has not gone this far, Falconbridge observes that there would seem no justification for departing from the rule that the connecting factor must be characterized in accordance with the *lex fori* in a case where the conflict rules of two countries agree in referring the contract to the place of making, yet this may be only apparent agreement, for they may differ as to the characterization of the place of making the contract, in one country the place of signature, and in the other the place of delivery may be regarded as the place of making the contract, or in the case of a contract by correspondence, in one country it may be the place of posting the acceptance, while in the other, it may be the place of the receipt of acceptance. If this is the problem, Falconbridge thinks, it cannot be solved on the basis of *lex loci celebrationis*, for, to say that place of making means the place where the final act was done which made the promise or promises binding "would seem to be putting the cart before the horse or, better, lifting oneself by one's boot straps and would lead to complex and apparently insoluble problems."¹

As regards the *situs* as the connecting factor there is not much difficulty, and it is especially so as regards the *situs* of tangible things, because it is a matter of fact, in regard to which there can hardly be any conflict. But in cases of the *situs* of the intangible things, there is a possibility of the conflict of characterization, as the opinions can differ as to the legal *situs* which should be attributed to them, not only this there may also be a conflict as to whether the *situs* should always be used as a connecting factor in regard to the intangible things.

Third Stage *The characterization of the proper law*—When the factual situation, institution or the question has been characterized and the connecting factor has been chosen by the Court, the next and the last stage is the application of the proper law directed by the connecting factor. This has been called 'The Delimitation and Application of Proper Law' by Aderson. Apparently it would seem that once the first two steps have been taken, the application of the proper law would follow logically and there would be no difficulty in this regard, but in reality it is not always so, though in some cases the proper law may follow as a matter of course. It is so because as Falconbridge puts it, the thing which is characterized is not the factual situation, but the juridical question raised by the factual situation, including its various place elements. Once the Court has chosen the connecting factor, the link joins the situation in question with some country, and this link also directs to the selection of the law of some country as the proper law. In the third stage of the process of characterization, the provisions of the proper law must be applied to the issue and thus a decision would be given by the Court.

Therefore, the enquiry at this stage is as to what provision of proper law will exactly be applicable. For instance, an Indian Court has to decide a case involving the distribution of personal property of a person upon his death. It would come to the conclusion that the domicile of the deceased at the time of his death is the connecting factor, and characterizing on the basis of the *lex fori*, it comes to the conclusion that the domicile was in France. Or, in a contract case, the Court came to the conclusion that the *lex loci contractus* is the connecting factor, and again it finds that the place of contracting was in France. The question is which French law will be applicable, whether the French internal law or the French rules of Private International Law.² And this becomes more vital when the French rules of conflict of laws differ from that of the forum. Here, again, it would involve the application of the doctrine of *renvoi*.

The writer proposes to discuss the problem in this stage apart from the doctrine of *renvoi*.

Robertson, who discusses this problem under the head of secondary characterization, holds that the characterization of the proper law should be on the basis of the *lex causae* and, according to him this is to be so on principle. As soon as the proper law has been indicated the rules of forum cease to be applicable and any problem of characterization arising in the application of the proper law has to be governed by the law of that foreign country. Cheshire holds the same view. Though, it has to be noted that both the writers do not agree between themselves as to the type of cases which are governed by the secondary characterization.³

A brief review of the two cases—Dutch Will case, and *Ogden v Ogden*¹ which have been often discussed by writers in this connection, would not be out of place. In the Dutch Will case, a Hollander made a holographic will in France. The Dutch law prohibits Hollanders from making wills in holographic form either at home or abroad. On the assumption that from the Dutch point of view the question will be one of capacity, and further that French law will consider it as one of the formalities, Bartin came to the conclusion that the case was one where no uniformity of decision could possibly be arrived at.² Cheshire considers it to be the problem of primary characterization and holds that the *lex fori* would apply. While according to Robertson, as he considers it to be the question of secondary characterization, if such a will, disposing of movable property, is executed in England, the English Courts have to enquire what is the meaning of capacity under the French Law and what is the meaning of formalities by the English law, so under the rules of British Private International Law, the capacity is governed by the domicile and the formalities by the law of the place.

Lorenzen has summarily disposed of this case by saying that from the standpoint of Dutch law, the will will be invalid without any need of characterizing the law relating to form or capacity. 'The case, presented, therefore, is in reality not at all a problem of differences in qualification.'³

¹ See Part III of this paper. In the famous case of *Hollander's Will* the question has been characterized as falling in the Primary Characterization by Cheshire and therefore he thinks that the *lex fori* should govern. On the other hand Robertson considers it as a question falling under the secondary characterization and therefore thinks that the *lex causae* should govern.

² ¹ a The facts of the case have been given in Part II of this paper.

² This view has been supported by various writers and Judges in various countries.

³ Lorenzen p. 130. Some writers have denied validity to the will anywhere either because they regarded the Dutch law as affecting capacity and therefore governed by testator's personal law (i.e., Dutch law), or, conceding that the Dutch statute affected formalities because they did

As regards the case of *Ogden v. Ogden*¹, all opinions are in agreement that in this case socially most undesirable result was arrived at by the Court, and various solutions of the problem have been suggested. Beckett² suggests that full effect should be given to all French provisions, including those relating to formalities abroad, the reason given for this by him is that they are matters of family law and intended for the protection of family interests. But Cheshire³ and Falconbridge⁴ think that the characterization of the French requirements must be according to the law of the forum.

Lorenzen⁵ thinks that, if the English rule that the capacity to contract a marriage is governed by the law of domicile is a general rule, and, therefore, if the *lex fori* governs the characterization, the ultimate question is whether the French Law or the English Law is to be applied in the matter of consent of parents. "The answer to the question depends upon whether the consent of parents is to be characterized as appertaining to capacity or to form. This question, the law of the forum must decide for itself. If the English Judge were to submit to the French view and regard a French provision as one of capacity when from the English point of view it is a matter of form, he would, as Cheshire points out, apply a law which is considered inappropriate by the law of the forum."

As well might the English Judge prefer the French to the English rules for the choice of law, i.e., accept the *renvoi*.⁶ Lorenzen further observes that Robertson and Cheshire start from the assumption that there are established rules of English Private International Law, for example, the capacity is governed by the *lex domicilii*, and the formalities by the *lex loci celebrationis*. Had this been so, remarks Lorenzen, the marriage would have been obviously valid in England, but, then, there would have been no question of characterization.

Therefore, despite the formulations of Robertson and Cheshire, the problem remains. Whether or not the questions and the subsidiary questions, which might arise after the foreign law has been chosen by the *lex fori* should invariably be referred to the *lex causae*? Of course, the answer to the question would be simple if the characterization problem merely involves the application of foreign internal law the answer would be that the foreign law should control. Thus, if the proper law to be applied is directed to be the French law, then, if the case, say, is the contract or tort, all the subsidiary questions, as for instance, whether the contract is to be regarded as of a loan or deposit, whether the master is responsible for the tort of the servant, or what is meant by master and servant in this regard, will be governed by the *lex causae*.

If it is so, then would the characterization of the *lex causae* into substance and procedure of the issue concerned be acceptable? Robertson and Cheshire, who have dwelt at length on this question, seem to simply answer it by saying that

not attribute an absolute character to the rule that the law of the place of execution governed formalities, but regarded it with respect to Dutch nationals, as subject to modification by the national legislation. See various Continental and American cases cited by Lorenzen.

1 The facts of the case have been given in Part II of this paper.

2 Beckett, the Question of Classification (Qualification) in Private International Law, B Y I L P 46.

3 Cheshire (2nd Ed.) p. 36.

4 53 *Law Quarterly Review*, 235, 249.

5 Lorenzen, p. 131.

6 Lorenzen p. 132.

rules of procedure of the *lex causae* cannot be accepted by the forum, and, by the established rules of Private International Law, they have got to be disregarded. This, as we have seen above¹, would lead to the maintainability of an action which is neither maintainable by the law of the forum nor by law of the *lex causae*². This, in the present submission, cannot be considered as a desirable result. This goes to prove that the theory of two fold classification is not sound.

More or less accepted object of Private International Law, is to keep the rights of the parties the same regardless of their location. Lorenzen thinks that the statement that the Court should enforce foreign substantive laws but not foreign procedural laws has no justification if the so called procedural law would normally affect the outcome of the litigation. At the same time he concedes that, so far as the detailed steps and modes of procedure are concerned, Courts can operate only in their accustomed manner. However, what he wants to point out is that not all the laws called procedural stand in the same category. Such statutes, as Statutes of Fraud and Limitation, are not the ordinary laws of procedure as are the rules which provide for modes of evidence, notice, etc., for they can be proved as easily and without any great inconvenience than any other foreign law that may be applicable under the rules of Private International Law³.

V—DOCTRINE OF RENVOI

The last stage, as we have seen, in the determination of the problem of characterization is the application of the law of a country, what is the meaning of this expression? This brings us to the problem of *renvoi*, which is of many connotations, it has a wider meaning, it has a restricted meaning, and it is found in various forms. Despite a huge controversy on the matter, and despite the fact that most of the decisions in most of the countries are far from being satisfactory, it has received recognition in many countries, though the form in which it has been recognized is not uniform⁴. There are various cases in which it has been thought to have a

1 See Part III of this paper.

2 This comes in clear relief when it is realized that Cheshire does not favour the theory of acquired rights on the basis of his secondary characterization theory, it appears that those rights would be enforced which are recognized nowhere. Cheshire in the 3rd Edition of his book tries to escape from this dilemma by quoting and accepting Cook's formulation, but, then, logically considered, this concession leads to the abandonment of this theory.

See remarks of Falconbridge at p. 457. Also see the views expressed by Goodrich and in the American Restatement. The acquired right theory has been criticised by writers, especially by Cook who has given a devastating criticism of it, though his own theory, the theory of local rights, is not free from some of those criticisms which he had levied against the acquired right theory.

3 Lorenzen pp. 134-35. See Wharton Conflict of laws, and the German case involving the validity of a Tennessee promissory note facts given in Part II of this paper.

Nassbaum considers the analysis and appraisal of the integration process—the process of determining whether the foreign institution conforms substantially to that of the forum—as constituting the central problem of qualification.

4 According to Falconbridge the problem of the *renvoi* arises only in case of a conflict between the conflict rules of different countries, whether the conflict be patent or latent, and some advance may be made towards general agreement if the different classes of conflicts are analysed and distinguished because the *renvoi* may afford a reasonable solution in one kind of conflict and may be inappropriate in another kind of conflict.

5 Conflicts of conflict rules are divisible into three classes. A conflict of the first class is a latent conflict arising from a divergence in the characterization of the question involved in the factual situation.

6 Chaud and the consequent selection of different connecting factors. A conflict of the second class of the test conflict arising from a divergence in the characterization or definition of the nominally proper connecting factor indicated in the conflict rules of the two countries in relation to the same situation.

7 L. R. conflict of the third class in the patent conflict arising from the fact that the conflict rules of two countries indicate different connecting factors in relation to the same question.

8 Lorenzen, p. 167.

legitimate application, there are other cases, due to the nature of which, it has been thought not to be applicable, while in others its application is thought to be doubtful. Many writers are of the opinion that it should have no place in Private International Law, while others have opined that for certain purposes it can be rightly retained.

When it is said that law of such and such country is applicable it may mean¹

(a) Internal Law of that country, or

(b) The whole law of that country, including the rules of Private International Law. If the rules of Private International Law of the country directs that its municipal law shall be applicable, then and then only the municipal law shall apply. But it can happen that the rules of Private International Law of that country, either

(i) refer back to the country, or

(ii) refer forward to a third country.

For the former, the French word used is *renvoi*, the German word, "*Rückverweisung*" and the English, "Remission". For the latter, the English word is "Transmission" and German Word is "*Weiterverweisung*". In the sixth Edition of Dicey the former has been called "a patent conflict of conflict rules involving a reference back to the forum" and the latter as "a patent conflict of conflict rules involving reference on to" a third country.²

Schreiber has very tersely put the problem thus: "When the conflict of laws rule of the forum refers a jurial matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system, i.e., to the totality of the foreign law minus its conflict of laws rules?"³

The problem can further be illustrated by a few examples³

A British subject domiciled in Italy dies intestate leaving movable property in England. An English Court has to adjudicate between A and B as claimants to succession. A bases his claim on Italian law of inheritance, while B contends that he should succeed under the English law—the Administration of Estate Act. Under English Private International Law the law of the domicile of the deceased, i.e., Italian law, is decisive. If the Court rejects the doctrine of *renvoi* it simply applies Italian internal law and decides in favour of A, if on the other hand it accepts the doctrine—as in fact English law does—it first ascertains the Italian rules of Private International law concerning succession, and as this rule refers to the national law of the deceased, it applies English internal law and gives judgment for B, this is an example of remission, or *Rückverweisung*.

Suppose in the above illustration, the deceased is a German subject domiciled in Italy. Then the *renvoi* doctrine leads to the application by the English Court

It may be noted that the Courts have so far applied the doctrine of *renvoi* in the second and third classes of conflicts, and it has not thought fit to apply it to the first class of conflicts. Falconbridge suggests that the possibility of the application of the *renvoi* and consequent solution of the problem should be explored. The present writer submits that the inter relation of the characterization and *renvoi* should not be forgotten, which it appears that the Courts have sometimes in fact forgotten.

¹ Conflict of Laws, p. 49

² 31 Harvard Law Review, p. 525

³ See Martin Wolf at pp. 187-190 where he has given illustrations and also Dicey's Sixth Edition at pp. 31-54, where the learned editor has summarized the leading cases on the doctrine.

of German internal law of inheritance, since this is the national law to which Italian conflict rule refers. This is an example of Transmission, or *Weiterverweisung*.

A British subject, domiciled in Copenhagen from birth, had his ordinary residence (his 'domicile' in the Danish sense of the term) in England, but without losing all ties binding him to Denmark. In a law suit concerning the succession to his movables the English Court will apply English law, for this reason. The English conflict rule declares that the law of the last domicile (in the English sense) is to be decisive, that is, Danish law. The Danish conflict rule declares that the law of the ordinary residence (what the Danes call 'domicile') governs succession, and as the ordinary residence was English the Danish Court will apply English law. Under the rule of *renvoi* which has been called in Dicey's sixth edition 'a latent conflict of conflict rules', the English Court has to apply Danish conflict rules, therefore the English municipal law obtains.

Two further illustrations might be taken from the decided cases.

An English woman whose domicile of choice was in Italy by a will left all her property to distant relatives to the exclusion of her only son. After her death, the son claimed his share in the property, i.e., to what he would have been entitled by Italian law, the action was filed in an English Court. The beneficiaries under the will resisted this claim on the ground that under English internal law, which was applicable to the case they were entitled to the property.

After laying down that succession to movables was governed by the *lex domicilii*, and to immovables by the *lex situs*, the Court proceeded to determine them both separately. As regards the *lex domicilii*, it was the Italian law, therefore the Court proceeded to determine the issue as the Italian Court would determine it. The Italian law referred back to the law of nationality of the testatrix, and refused to take back the remitter the English municipal law was held applicable. As regards the second part the same principle applied.¹

In *re Duke of Wellington*. Under a will, a British testator domiciled in England, gave lands in Spain to the person who on his death would become Duke of Wellington and Ciudad Rodrigo. The said testator was killed in action in 1943. At that time he was unmarried.

In 1813 the Spanish Dukedom of Ciudad Rodrigo was given to the first Duke of Wellington and his male and female issues, while the British Dukedom was limited *in tail male*. In 1943, after the death of the testator, the two Dukedoms became separated to the Spanish Dukedom the sister of the testator succeeded, and to the English Dukedom his uncle succeeded.

The testator made two wills the Spanish will under which he bequeathed his Spanish estate to the Duke of Wellington, and the English will, under which he bequeathed all his residue property to the same person. Since after the year 1943, the two Dukedoms splitted the question of interpretation of the Spanish will arose.²

After laying down that the devolution to Spanish estate depended upon the *lex situs*, the Court proceeded to examine whether the Spanish law would accept the

¹ In *re Ro's I R* (1930) Ch 377

² L.R. (1947) Ch 506

renvoi. Since their lordships came to the conclusion that it will not, they held that English law applied

Possessing a voluminous literature, the doctrine of *renvoi*, though can be traced back to the year 1652, in the decisions of Parliament of Rouen of 1652 and 1663, and also in the English decisions of 1811¹, 1847², and 1877³ and in a German decision of 1861, came in limelight as a result of the decision of the French Court de Cassation in *Forgo's case*, which led to a continued violent discussion. To-day most of the countries recognize it, though the form in which they recognize it is not uniform, and in different countries it is based differently. In this perspective the present writer proposes to give a brief review of main theories, or main variations of the doctrine of *renvoi*, and their criticism and also proposes to examine the issue whether it should be retained.

Theories of Renvoi—As we have seen above the doctrine of *renvoi* comes into play in the second and third stage of characterization, we have also seen that there does not exist a uniform basis for the application of this theory. It is applied in different forms in different countries and different theoretical considerations have been advanced by different writers. The implication of the recognition of the theory of *renvoi* is that the rules of Private International Law are to be understood as not only incorporating the rules of internal law of the foreign country but also its rules of conflict of laws. The principal theories are three⁴

- (a) The Mutual Disclaimer Theory,
- (b) The Theory of *Renvoi* Proper, and
- (c) The Foreign Court Theory

The Mutual Disclaimer Theory—The two main proponents of this theory, von Bar and Westlake, start from the assumption that all rules of Private International Law are in reality rules by which one State, for the purpose of administration of private law, defines its own jurisdiction and the jurisdiction of foreign States.

At a meeting of the Institute of International Law, held at Neuchatel, in 1900, von Bar expressed his views thus

"(1) Every country shall observe the law of its country as regards the application of foreign laws

(2) Provided that no express provision to the contrary exists, the Court shall respect

(a) The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desire that said personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred

1 *Collier v. Riaz*

2 *Frere v. Frere*

3 *The Goods of Lacuz*

4 Falconbridge who has discussed the problem of *renvoi* very elaborately, discussed three theories: the Ping Pong Theory, the Foreign Court Theory, and the Vested Right Theory, Chapter 8, section 5. In Chapter 9 section 1 he discusses the theory of Partial *Renvoi* and the Theory of Total *Renvoi*. Morris (Dicey's Sixth Edition) discusses the theories: The Internal Theory, the Partial *Renvoi* Theory, and the Total *Renvoi* Theory. Lorenzen discusses two theories: The Mutual Disclaimer of Jurisdiction Theory, and the Theory of *Renvoi* Proper. It appears that he has discussed the Foreign Court Theory under the second theory. Cheshire discusses two main theories: the Theory of *Renvoi* and the Foreign Court Theory.

(b) The decision of the two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agrees in attributing the determination of a question to the same system of law '.

Starting on the assumption that the distinction between internal law and international law belongs only to the science of law but does not actually exist Westlake proceeds to give the following two rules to illustrate his point of view. Suppose a legislature provides

(A) that the capacity to make a will shall be acquired at the age of 19, and that

(B) the capacity of persons shall be governed by their national law

According to him the Rule (A) will have no meaning without the Rule (B), for the question is whose testamentary capacity is acquired at 19? And this cannot be answered without the aid of Rule (B), which fixes the category of persons whose capacity the legislature thinks it has a right to fix. According to Rule (B), Rule (A) provides that the capacity of the subjects of legislature is acquired at 19 but it provides nothing regarding the capacity of foreigners domiciled within the territory. And had the Rule (B) said that the capacity will be governed by the law of domicile, Rule (A) would have enacted that the capacity of persons domiciled within the territory of the legislature is acquired at 19, but then, would have provided no hint regarding the capacity of its own subjects domiciled abroad.

Therefore Westlake opines in whatever terms Rule (B) may be expressed, its true sense will be limited to the cases which, according to the ideas of the legislature fall within his authority. There are certain class of cases which are deemed by a legislature as belonging to it and with regards to which it intends to legislate. This he proceeds to illustrate as follows. The Danish Parliament, attaching decisive importance to domicile will regard as the normal case in the matter under discussion a person domiciled in Denmark for whom it fixes the age at 21. While, the Italian Parliament attaching decisive importance to nationality, the normal case would be that of an Italian subject and for him it fixes the age at 19.

Further Westlake says that a legislature which regards a certain case as normal will regard analogous cases as being normal for other legislatures and as belonging to them. On this principle the Danish legislature will direct its Judges to recognize persons domiciled in a foreign country as capable or incapable of making will in accordance with the law of their domicile, and similarly the Italian legislature will give importance to nationality and decide the cases accordingly.

Westlake proceeds to say that on the basis of this second step, although the legislatures, like that of Italy, can provide for persons domiciled in a country whose law in the matter is also based on the *lex domicilii*, the Danish legislature cannot provide a rule for persons domiciled in countries like Italy, whose laws are silent as to the capacity of persons domiciled in such jurisdiction, likewise the reverse is also true.

Under such situation according to Westlake, a third step for the solution of the problem would be necessary to direct the Judge to apply, in the absence of another law, the normal law, therefore, the Dane domiciled in Italy will be, in Denmark deemed to have come of age at 21, while, in Italy, he will be deemed to have reached that age at 19.¹

1 Westlake first expressed these views in a note addressed to the Institute of International Law

The above formulation of Westlake is as regards the *Rückweisung*

In regard to *Weiterverweisung*, or the transmission, Westlake holds that Rule (B) does not require the English Judge to follow the direction of transmission; instead he should apply the normal law of his country i.e., Rule (A). Or to put it in other words, it is the duty of the Judge to determine, in the first instance, to which country 'the legal relationship' presented to him belongs, if the law of the latter, upon another system regarding the conflict of laws, says that the case does not belong to it, there is no further reference to the law of a third state.¹

In its net result the mutual disclaimer theory of Westlake and von Bar in all cases where there is a conflict between the law of the forum and law of the foreign country invariably directs that the law of the forum shall be applicable. Whenever the rules of conflict of laws of two countries are different, the inevitable presumption upon which the proponents of this theory start is that in fact, there is no rule of internal law of either country applicable to the 'legal relationship' in question, rather there is a vacuum, a gap, which has got to be filled, and it is filled the best way by the application of the internal law, or what Westlake calls ordinary law, of the forum and, obviously, the theory refuses to accept any reference, or transmission, to a third country nor is the Judge to consider himself as sitting in the Court of the foreign country.

There is a slight difference between the formulations of von Bar and Westlake. Von Bar, as appears from his Rule 2 (a) seems to restrict his theory to cases where the personal statutes are involved—cases of collision between law of nationality and domicile or the law of the place. While Westlake seems to propound the application of his theory to all cases where the different rules of the countries in question amount to mutual disclaimer of jurisdiction.

Buzzati, one of the rapporteurs on the question of *renvoi* before the Institute of International Law thus summed up the criticism of this theory

(a) The starting point, namely, that a legislator adopting the law of domicile, to determine capacity, is not interested in his subjects abroad and does not legislate with reference to them, and that a legislator adopting the law of nationality in his system of the conflict of laws is not interested in foreigners domiciled within his territory and does not legislate with respect to them, rests upon an erroneous

¹ The statement on the theory has been somewhat differently made by Westlake in his book *Private International Law*. The matter is so cardinal in relation to the real meaning of private international law that, at the risk of being tedious I will put it again in different language but with a difference only of language. The English or the Danish Judge cannot hold the lad of 19 to have attained his age unless he is prepared to answer the question 'what lawgiver made him of age?' That is independent of all views about conflict of laws for it results from the nature of law itself. Now the Italian Code does indeed seem to lay down a rule about the status and capacity of all persons without exception but it is only a misleading generality, for no one can doubt that the principle of nationality adopted in Italy prevents the Italian lawgiver from claiming authority over the capacity of a British or Danish subject. The English or Danish Judge therefore cannot say that the Italian lawgiver made the *de capite* of age at 19. Then it will be asked, who is the lawgiver that keeps him minor till he has attained 21? And the answer is the British or Danish lawgiver, for no one can doubt his authority over the capacity of his subjects if he chooses to exercise it and the Italian lawgiver's disclaimer removes the objection which he would have felt to exercising it in the case of one of his subjects who was not domiciled in the British Dominions or in Denmark. The result will coincide with that given by *renvoi* properly limited so as to avoid an endless series of references to and fro, but its real base lies, not in the doctrine of *renvoi* but in the duty of considering the essential nature of the legal relation in question in any concrete case and the essential meaning of the rules of private international law adopted in different countries concerned.

assumption. It is absurd to say that the provisions of the Italian Civil Code do not apply to an Englishman who is domiciled in Italy.¹

(b) Neither von Bar nor Westlake denies the competency of a state to extend its jurisdiction over a matter which another state claims for itself. And yet, their theory rests upon the fundamental proposition that due respect for the state of *X* makes it improper for the state of *Y* to assign to the state of *X* a jurisdiction which the state of *X* declines. Just as if it were not a greater offence to deprive the state of *X* of a jurisdiction which it claims than it would be to assign to it a jurisdiction which it does not claim.

(c) The fundamental error of the theory consists in the assumption that it is possible for the state of *Y* to bring its own jurisdiction into perfect accord with that of other states so that there will be no infringement upon their jurisdiction. But this is impossible and will remain so as long as the states have different rules relating to the conflict of laws. Each state is, therefore, obliged to adopt its own rules without referring to those of other states.

Lorenzen has observed that this theory also lacks support from an historical point of view. The fundamental assumption of Westlake, which is also his point of departure, that there is an inseparable connection between the rules of Private International Law and rules of internal law of a country, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application cannot be admitted. This Lorenzen illustrates from the following. Could it be assumed that Romans enacted their laws without reference to their application in space as in Rome there were no rules of Private International Law in the proper sense? Although continental countries have known the science of Private International Law for a very long time, their modern codes contain such scanty reference to the rules of Private International Law that an assertion that the legislation in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law would be an absurdity. This comes in clear relief in reference to Anglo American laws, for the Anglo American internal laws were more precisely developed and defined before the rules of Private International Law were adopted in their system. Then, Lorenzen poses the question. With what show of reason can it be said that the two are one and inseparable? He asserts that laws are enacted without any reference of their application in space. no doubt the aim of the one of the objects of the science of Private International Law is to fix the limits of the application of the territorial law of such country, but it is not only this. It also includes the determination of the foreign law applicable to those cases in which the *lex fori* does not control, had it not been so the Courts of the forum would be left by the national legislator without any guide as to the applicatory law in that class of cases.²

With the above criticisms the writer is in substantial agreement.

The Theory of Renvoi Proper—As we have seen in the beginning of this Part of the paper, the doctrine of *renvoi* implies two notions—the *Rückverweisung*, i.e., the notion of return reference, or remission, and the *Weiterverweisung* the notion

¹ Kahn has discussed this point more elaborately.

² See Lorenzen. *The Renvoi Theory and the Application of Foreign Law*, p. 19.

of forward reference, or transmission the former is sometimes called *renvoi* in its narrow sense, or *renvoi* proper, and the latter *renvoi* in its wider sense. Some writers support the former, while others the latter. It appears that the English decisions tend to support the latter. The *renvoi*, in its both notions, has been thus explained by Schmitthoff¹

A British subject, dies intestate in Brussels. He leaves movables in both England and Belgium. An English Court is called upon to decide whether movables have to be distributed according to English or Belgian Law.

Under the first notion of *renvoi*, the position would be

English law referred to the Belgian law of domicile

and

Belgian Law remitted to the English law of nationality. However, as the English Courts imagine that they take the place of the Belgian Courts, the correct terminology would be

Belgian law refers to English Law (as the law of nationality)

and

English law remits to Belgian law (as the law of domicile)

All depends now on whether the Belgian Private International Law accepts or rejects the remitter (*renvoi*) from English Law, since

Belgian law refuses to accept the remitter, English internal law applies.

Conversely, if the foreign law accepts the remitter, as German law does (now supposing that A had died domiciled in Hamburg) the position would be

German law (as applied by the English Courts) refers to English Law (as the law of nationality),

and

English law remits to German law (as the law of domicile)

German law accepts the remitter, consequently German internal law applies.*

Bentwich, who appears to accept the *renvoi* theory in its narrow sense, advances the following arguments in its favour

"The *renvoi* is in principle a reference back not to the whole law of the foreign country including its different rules of Private International Law, but simply to its internal law. Suppose a case where the *lex fori* (hereinafter called A) submits the matter to the *lex dom cili* (hereinafter called B), and B refers the matter back to A as the law of nationality. A accepts the *renvoi* and applies its own law. If we regard first principle, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to succession. A, from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised and there is no ground for A to decline to accept the renunciation of B, since it thereby puts

1 Schmitthoff, *English Conflict of Laws* p. 93.

2 *Ibid*.

Leading cases on this theory are *In re Aske*, L.R. (1930) 2 Ch. 259, *In re Ross*, L.R. (1930) 1 Ch. 377, *In re Duke of Wellington*, L.R. (1947) Ch. 506.

into operation its fundamental principle of regulating every matter within the territory"¹

The application of *renvoi* in this form, would always, like the application of the mutual disclaimer theory, lead to the application of the law of the forum, wherever there is a conflict between two foreign laws. However, the bases of the two are different.

The theory of *renvoi* in its narrow sense, as Bentwitch has remarked starts with the assumption that the rules of Private International Law in each country are based on the principle of comity, upon the theory of an implied agreement among the states for the application of each other's laws. The basis is reciprocity as well. If reciprocity is not guaranteed, then the law of the forum will always apply. And, in the present submission, this is the fallacy of the whole argument. The rules of Private International Law are based neither on comity nor on reciprocity. They have a wider basis. As Lorenzen remarks "Considerations of justice and of expediency have played a very important part in the adoption of specific rules in conflict of laws."² It is obviously clear that the principle of domicile was not accepted by the Anglo-American jurisprudence on the basis of reciprocity, had it been so they would have accepted the principle of nationality, but that would have never suited to the Anglo-American needs. "It (the theory of *renvoi* in this form) is nothing else than a return *pro tanto* to the doctrine of the exclusive prevalence of the internal law of the forum"³ Another writer remarks "It is illogical. No logical reason can be given why if in the one case Massachusetts law be taken to refer to the French conflict of laws rule, the latter should not in turn be held to refer back again the Massachusetts conflict of laws rule, and so on *ad infinitum*."⁴

The Foreign Court Theory—About hundred and ten years ago, an English Judge, Sir Herbert Jenner, thus formulated this theory "The Court sitting here decides from the persons skilled in that law, and decides as it would if sitting in Belgium."⁵ The question at issue was concerning the power of testamentary disposition of a British subject who died domiciled in Belgium. However, as Lorenzen observes, the statement of Sir Herbert is not to be taken literally. An English Court does not actually decide the case as the Belgian Court would. This Lorenzen proceeds to explain by an illustration. An English Judge is seized of a case where the personal estate of an Englishman who died domiciled in Belgium has to be distributed. The English law would direct that Belgian law should be applied—being law of domicile. If Sir Herbert's statement is to be interpreted literally then the English Judge would be compelled to ascertain how the Belgian Judge would decide the case. The English Judge would find that according to Belgian law the property is to be distributed according to the law of nationality, i.e., English Law, and he would also find that the Belgian Courts follow *renvoi*, and, therefore, in consequence of this, the distribution of the property will actually be made in accordance with the Belgian law. And, then, the English Judge should apply the Belgian law. But this is not true. In fact the English Judge will apply

1 Bentwitch. The law of Domicil in its Relation to Succession and the Doctrine of *Renvoi*

2 Lorenzen p. 65

3 Lorenzen p. 66

4 Schreiber 31 Harvard Law Review, 533

5 Collier v. Rivaz, (1841)

the English Law The English Judge will ignore the existence of the doctrine of *renvoi* in Belgian Law The reasons for this are obvious If the Belgian doctrine of *renvoi* is recognized, then in fact no decision will be arrived at, for then there would be endless series of references, from which there would be no escape.

To escape from this intricate series of references, the return reference is meant to be understood as a reference to the internal law only

But is the position same in case of transmission, or *Weiterverweisung*? Lorenzen thinks that the point is doubtful Since, Lorenzen opines, the doctrine of *renvoi* appears to be a mere expedient to which the Courts resort in order to justify the application of their own law, it is probable that in case of transmission the judges might interpret it to mean a reference to the law of third country including the doctrine of *renvoi*

It may be noted that there is a difference between the theory of Bentwich and this theory Bentwich's theory necessarily leads to the application of the law of the forum, while this theory does not necessarily lead to the application of the law of the forum

The doctrine of *renvoi* is a much criticised doctrine in Private International Law. Many writers have expressed the view that its abolition will be more conducive for the advancement of Private International Law It has not only been criticised on logical and historical grounds, but also on the grounds of principle

The criticism of writers may be summed up as follows

(i) If the foreign country also adopts the *renvoi* doctrine then logically no solution is possible at all, for a perpetual *circulus inextricabilis* would be constituted. Therefore, as Lorenzen says, it is difficult to approve a doctrine which is workable only if the other country rejects it

(ii) Wynn-Parry, J, observed "It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which, upto the present time, has made no pronouncement on the subject and having to base that exposition on evidence that satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of Courts of inferior jurisdiction"¹

(iii) If we assume that the chief aim of the science of Private International Law is to bring about uniformity of laws, then could it be said that the doctrine of *renvoi* is conducive to that aim or otherwise?

As we have seen above, in all cases of conflict between the law of the forum and the law of the foreign country, under the mutual disclaimer theory of von Bar and Westlake and under the theory of *renvoi* proper of Bentwich and others, it is invariably the law of the forum which applies This certainly is not conducive to the international harmony of laws, rather these theories would have just the opposite effect And, in the present submission, it would not be of much help to the protagonists of these theories to say that rejection of *renvoi* theory would also lead to the same result By the rejection of the *renvoi*, a question may be determined

1. In re Duke of Wellington, L.R. (1947) Ch 506

in one country on the basis of the *lex domicilii* in another on the basis of the *lex patrie*, but if the *renvoi* is accepted in the above forms it may lead to the application of as many laws as there are states before the Courts of which the matter might be adjudicated.¹ This can be well illustrated by a few examples. The facts of an hypothetical case are, an Englishman who is domiciled in Italy makes a contract there, for the breach of which a suit is brought in India. defence is lack of capacity. Let us further assume that England applies the *lex domicilii*, Italy the *lex patrie* and India *lex loci contractus* as governing the capacity. According to Westlake and von Bar, the law of India, being law of the forum will apply, though this law has no connection with the suit save that it was brought in an Indian Court. To take another example. For the execution of a Frenchman's testamentary trust of the immovable property situated in America, a suit is brought in India. According to the law of forum (India) the law of *situs*, i.e., American, govern the validity of such a trust, but according to the law of *situs* the national law of the testator, i.e., French, applies. Under the above theories, the Law of India will determine the case. "To the extent that this theory is applied, it means a return reference to the exclusive application of the ordinary or internal law of the forum, and a sacrifice of all that has been gained during the last century in the development of the rules of conflict of laws."²

The foreign Court theory is none better. In so far as it leads to the application of *Rückverweisung*, it suffers from the same disadvantage as the above theories. In so far as it leads to the application of *Weiterverweisung*, it, as we have seen above, can be so manipulated that again the law of the forum may be applicable. And therefore, it will not lead towards the international uniformity of laws. For instance two Indians who are domiciled in New York enter into a contract in Italy, for the breach of the contract a suit is brought in New York, the defence is lack of capacity. The question is which of the three laws should determine the issue? Suppose the *renvoi* is not accepted. Then, a New York Judge will apply the Italian law as the *lex loci contractus*, India will apply the law of New York, as the *lex domicilii*, and an Italian Court will apply Indian Law, as the law of nationality. Now let us assume that these countries accept the Foreign Court Theory. The New York Court, then, would refer to the whole of Italian Law, it being the *lex loci contractus*, and as the conflict of laws rule of Italy direct that the law of nationality will be applicable, it would ultimately apply the law of India. The Indian Judge will refer the matter to the whole of New York law, and there being directed to apply the *lex loci contractus*, will decide the case under the Italian law. The Italian Judge will apply the whole of the Indian law, as the *lex patrie*, and from there being directed to the law of New York, will apply the New York Law. Thus, no uniformity has been achieved. "So far as the effect of the doctrine of *renvoi* proper in its wider form upon the subject of the conflict of laws is concerned, it must be definitely

¹ Bentwich has answered this criticism in the following words:

"The objection however, is a figment of theory, and is not based on a solid practical difficulty. Even if no rules were established by international convention for the application of the *renvoi*, in any particular case the English Court or the French Court would know whether the other had already dealt with the succession. If this were so, it would adopt the principle already applied to the succession, and apply either its own rules of private international law or the doctrine of *renvoi* so as to subject the whole movable succession to one law. Thus in the case supposed, if the English Court, first seized of the matter, had accepted the *renvoi* and applied English Law to the English assets of the deceased, a French Court would naturally apply English law to the French assets according to its own rules."

² Lorenzen, p. 72

understood that it will render the whole subject, which in its very nature is full of uncertainty, still more uncertain"¹

(iv) Dr Cheshire has very convincingly argued that the Foreign Court Theory suffers from ambiguity. According to him "The theory must be regarded as untenable unless it formulates with precision the exact inquiry that is to be addressed to the hypothetical foreign Court. Its most ardent exponents, however, hold opposite views upon the appropriate formula."² Then Dr Cheshire proceeds to examine the views of the two schools by taking an illustration. The question before the English Court is the mode of distribution of goods situated in England and belonging to X, domiciled in Russia. It is a well established rule that the *lex domicilii* governs the issue. As we have seen above the theory directs that the English Court should give the same decision as the Court of domicile would give. One school holds that the actual circumstances and facts of the case must be envisaged: this is in accordance with the views of Sir Herbert Jenner. The second school represented by Dicey and others enunciates a formula that ignores the actual circumstances. This school is prepared to presume that facts are not true, and is prepared to assume that the property was situated in Russia. These two formulas will yield different results. According to the law of the Soviet Union, the property which is situated within the Soviet Union is governed by its internal law, irrespective of the nationality or domicile of the deceased owner: and if the property is situated outside the Soviet Union, the Soviet internal law is not applicable, irrespective of the fact whether the deceased was a Russian national or he was domiciled there. The first school under the circumstances will decide the case as saying that the Soviet law has nothing to say in the matter, while the second school will apply the Russian internal law.³

The above is a summary of some of the criticisms levelled against the doctrine of *renvoi*. Space forbids summarizing all of them. This doctrine is a much criticised doctrine⁴, in Private International Law. Some of the writers⁵ have tried to answer the above criticisms.

In the present submission, the doctrine of *renvoi* whichever of its forms is applied, has not at all proved conducive for the development of Private International Law, therefore its retention is of doubtful value.

In the present state of development of Private International Law, to day, we need not follow dubious course, for, it is submitted, the one reason for the invention of this doctrine was, instead of the Courts of forum deciding issues, they use to hand over their determination to foreign laws, and sometimes this doctrine has been used as a cloak for applying the law of the forum, though through an indirect course. At the same time, it is to be noted, the science of Private International Law is not yet a well developed science, much has yet to be done, and much

¹ Lorenzen, p. 75. See Dicey (6th Edition) p. 58.

² Cheshire p. 27.

³ Dorbin: The English Doctrine of *Renvoi* and the Soviet Law of Succession, 15, British Year Book of International Law p. 36.

⁴ See Cheshire pp. 99-113.

⁵ Martin Wolf, p. 201, and Schmitzoff, pp. 96-97.

is impossible to be done due to certain inherent difficulties present in the problems of conflict of laws, unless the nations of the world sit in a conference and so formulate and adopt and modify their systems as to achieve some sort of uniformity in their systems, for instance so long as the conflict between the domicil and nationality continues to exist there is very slight hope of any uniformity, much of this can be achieved by advancing the comparative study, or some other method can also be employed. Unless that is done, it would appear to be necessary to retain the doctrine of *renvoi* for some cases. The writer, however, wants to make it clear that he supports the retention of *renvoi* in those cases only as a stop-gap arrangement, our endeavour should be simultaneously to arrive at some such results under which some sort of uniformity should at least be achieved, and the present writer hopes that this is possible, provided we leave a mechanical approach towards the subject.¹

The cases in which the retention of *renvoi* has been thought fit are

(a) *Title to Foreign Land* —The country in which the immovable property is situated has, by the very nature of the things, a permanent and exclusive physical control over it. Therefore, it would be a realistic approach if the title to such property is determined by a reference of the whole of the *lex situs*, i.e., including the rules of conflict of laws. "The reason for applying the *lex situs* is that any adjudication which ignores the *lex situs* would be a *brutum fulmen*, since in the last resort the land can only be dealt with in a manner permitted by the *lex situs*."² It would follow that if the law of *situs* recognizes the validity of a will or deed executed in accordance with the law of the place of execution,³ or if it recognizes the capacity of the *deviser* to execute such a will or deed in accordance with the law of the nationality or law of domicile⁴, or if there is a return reference to the law of the forum or if there is a forward reference to the law of a third country, this should be applied by the Courts of all countries. This is one of the exceptions recognized by the American Restatement⁵, this is also the law in the Soviet Union.⁶

(b) *Title to Foreign Movables* —As in the case of the immovables situated abroad, so in the case of movables situated abroad, it has been suggested that the doctrine of *renvoi* should be recognized. But, as Morris remarks, the argument is not so strong as in the case of land, because movables may be taken out of the jurisdiction of the foreign Court.⁷

(c) *In Matters of Marriage and Divorce* —Lorenzen suggests that, because of the favour shown to marriages, the *lex loci celebrationis* might be deemed to in-

¹ See the various Reports of the Conferences of the Institute of International Law

² Dicey, p. 59

³ Sections 7 and 8 of the American Restatement of Conflict of Laws

⁴ *R. Ross* L.R. (1930) 1 Ch. 377, *In re Duke of Wellington*, L.R. (1947) Ch. 506

⁵ *Id.*

⁶ *Dorlin* loc. cit. Lorenzen suggests an alternative rule. "Uniformity might be reached without recourse to the *renvoi* doctrine if all countries would adopt alternative rules in their systems of the conflict of laws. As regards the formal execution of a deed or will, the general acceptance of the rule *locus regit actum* as an alternative rule would be sufficient. With respect to capacity and the substantive validity of wills and deeds international uniformity could be brought about only in case all countries were willing to sustain such instruments if they satisfied either the law of the situs or the national law of the owner." He further says "Under the present conditions, the *renvoi* doctrine would appear to be the only practicable means by which such uniformity can be attained." Pp. 79-79.

⁷ Dicey, p. 60, Cheshire, p. 128

corporate the foreign law as a whole *for the purpose of sustaining a marriage*, but not to defeat it¹. However, Lorenzen proceeds to suggest an alternative rule which might be adopted in Private International law a marriage should be upheld if it satisfies either the law of the place where it was entered into or the law of the domicile of the parties². For the sake of uniformity in the rules of conflict of laws and in view of the special favour shown to family, it has been suggested that a change in the status of the parties done outside the country of the domicile of the parties, should be recognized by the Courts of the forum, provided it is so recognized by the Courts of the domicile. This view finds support in the case of *Armitage v Attorney General*³, wherein the English Court recognized a decree of divorce granted outside the country of the domicile of the parties. Should this rule be restricted to the recognition of the divorce decrees, or should it be extended to the matters of status? This has been answered differently. The American Restatement favours the former, while the decision in *In re Asfaw*⁴, suggests the latter. The present writer would support Lorenzen's alternative suggestion given above.

(d) *Formalities of Wills* Dr Cheshire suggests that a grant of probate to wills should not be denied "on the ground of formal invalidity if the instrument is formally valid according to the Private International Law, though not according to municipal law, of the governing legal system"⁵. Morris doubts the expediency of this indulgence⁶. Lorenzen seems to support it⁷. The present writer will favour an alternative suggestion: the formal validity of a will should be sustained if it is valid by the law of the *situs* or the national law (or the law of domicile) of the owner.

(e) It has been seen that the acceptance of the doctrine of *renvoi* is the only expedient through which the nations of the world could come together for framing the international conventions⁸.

(f) Von Bar suggests that in two cases on the grounds of justice, *renvoi* or something akin to *renvoi* should be recognized. The two cases are

(i) Two subjects of the State of *X* are married in the State of *Y*, where they are domiciled. The validity of the marriage is questioned in the State of *Z* on the ground that the parties had no capacity to enter into the marriage under the provisions of the law of the State *T* relating to marriage, though it is conceded that they possessed such capacity under the national law with respect to marriage. The laws of the States of *X* and *T* agree that the *lex patriae* shall govern the essentials of a marriage. The law of the State of *Z*, on the other hand, applies the *lex loci celebrationis*. Von Bar suggests that the Courts of States of *Z* should regard the marriage as valid.

(ii) *A*, a citizen of the State of *X*, dies domiciled in the State of *T*. The laws of the States of *X* and *T* agree that *B* is entitled to *A*'s personal estate in accordance with *A*'s national law. Subsequently *B*'s heirship is contested in the State

1 In support of this Lorenzen quotes the American case of *Lando v Lando*.

2 Lorenzen pp 77-78.

3 L.R. (1906) P. 135. See its criticism by Morris in 24 Canadian Bar Review and its defence by Tuck in 25 Canadian Bar Review.

4 L.R. (1930) 2 Ch. 293. Cheshire, p. 127.

5 Cheshire 127 and *Collier v. Rieu*, *Frere v. Frere*, and *Ross v. Ross*.

6 Dicey, p. 61.

7 Lorenzen p. 78.

8 See The Hague Convention of June 12 1912. Article I relating to marriages, and Article 74 of the Uniform Law of the Hague Convention of 1912, relating to Bills of Exchange.

of Z, in which State the *lex domicilii* is held to govern the distribution of personal property upon death Von Bar says that the Courts of the State of Z should recognize B's title

In the above cases von Bar seems to accept the doctrine of *renvoi* proper in a limited sense the limitations being firstly, the foreign countries with which the transaction has connections should have the same rules of conflict of laws, and secondly, the law of one of them should be applicable under the law of the forum Lorenzen supports this view ¹

VI—CONCLUSION

In the preceding Parts of this paper the writer has endeavoured to examine the problem of characterization as it has appeared before the Courts, the various theories that have been expounded for the solution of which, the problem as it has appeared in its different stages, and the doctrine of *renvoi*, in its multifarious phases, as being involved in second and third stages of the process of characterization The space has forbidden him from discussing and examining, and it is obviously impossible even within the limits of an excessively long paper to discuss and examine, a sufficient number of cases which are conveniently discussed to illustrate the problem and its complications and which extend over the whole field of Private International Law

It appears that no single theory has come to the solution of the problem and the problem remains as intricate as it ever was Some have suggested the total application of the law of the forum at all the stages of characterization, others have gone to the other extreme by saying that the *lex causae* should be applied at all stages of characterization, though both admit a few exceptions, In between these two extremes some writers have suggested a middle course, a *via media* Many theories appear to be lost in the logic of the arguments of their protagonists and the realistic approach appears to have been lost sight of It would be admitted that the problem, by its very nature and due to the state in which the rules of Private International Law are at present present manifold difficulties, and in many a branch of Private International Law no solution can conceivably be suggested Yet, the present writer would submit if the demands of justice is kept in view, and if it is realized that the function of law is to serve the society and the individual and not to cling to the dry bones of logic or mechanical jurisprudence, a solution, if not an overall solution, in individual cases can be found And, in the present submission, if the law can perform this function it is immaterial that logic has to be sacrificed If we agree that Private International Law is in its formative period, and if we admit that certain problems of which in their solution defy all logic, then our endeavour, keeping in view the demands of justice, should be to solve the problem What we should endeavour for is, a socially desirable result rather than a logically sound decision No one can, and happily no one does, support such decisions as to take only two examples, *Ogden v Ogden* and *In Re Bethel*

In the subsequent pages the writer's attempt would be not so much to pay heed to logic as to seek a solution through which we can arrive at a socially desirable result

¹ Lorenzen at p 77 thinks that the case of *Guernsey v The Imperial Bank of Canada* can be supported on this ground

The differences in the point of views of different theorists is nothing but a reflection of a still wider differences among them about the fundamental conceptions of Private International Law. On the one hand are Bartin and Kahn, on the other, Despagnet and Gemma. Bartin and Kahn were nationalists, while Despagnet and Gemma were internationalists in Private International Law. Nationalists and internationalists differ among themselves. "A common characteristic of all internationalists," Lorenzen points out, "is their position that the rules of the conflict of laws are dictated to individual States from without by some species of international law. According to them there is one single system of the conflict of laws, the rules of which are binding for purely international reasons. The nationalists are agreed on the other hand that the rules of the conflict of laws form a part of the national law of each State and that there are, therefore, as many systems of the conflict of laws as there are independent States." On these premises, of variously, it is natural for internationalists to find a solution of the problem of characterization on some international basis, while it is also natural for nationalists to rest content by finding a solution of the problem by reference to the law of the State concerned.

It is a singular paradox that the internationalist theory in Private International Law was first advanced by von Savigny who all his life was a confirmed opponent of natural law, from which the law of nations was derived. In the eighth volume of 'System of the Modern Roman Law', Savigny, after discussing the 'spatial limits of the control of law over legal relationships', postulates as a corollary to the 'equal treatment of nationals and foreigners' the equal adjudication of conflict of cases. This meant application of the same law notwithstanding the conflict of jurisdictions. The reason for this equality, according to him, was the necessity of the international intercourse based upon the community of nations. Under Savigny's theory the law applicable to a legal relationship would be the law of the territory to which it is subjected (*Sitz*).

Independently of Savigny, Mancini in Italy also developed an internationalist theory. After the propagation of this theory by Savigny and Mancini, the flag of internationalism was picked up by many writers on the continent. Zitelmann constructed a complete system of Private International Law on the basis of this theory.

On theoretical considerations the views of internationalists appear to be sound, for in theory they appear to establish an international harmony in the rules of Private International law. But, practically considered, the utter fallacy of their arguments is revealed. They all start from the assumption that there are some internationally uniform rules. While, the fact of the matter is that there are no such internationally uniform rule in existence and, even if there are some, they do not, and under the conditions cannot, impose an international obligation for their enforcement, rather the preponderantly established fact, howsoever injurious it might be for the advancement of Private International Law, is that every nation is free to frame its own rules of Private International Law except where some international convention has been entered into. According to Holland

"It follows from independence of each State within its borders that it might without contravening any principle of international law regulate every set of circumstances which call for decision exclusively by its own law."

Whether or not the internationalist theory is "a creed, a transmutation of forceful, liberal and cosmopolitan tendencies into dogmas through a psychological process also observable elsewhere," it is undoubtedly an idealistic and unrealistic approach to the rules of Private International Law. As has been observed judicially by Maughan, J.

"It would seem that rules of private international law, not being founded on considerations of justice or statute, but being based upon considerations of justice and what is called 'comity' to be the same in all countries though it is well known that they are not."

And Lindley, L.J., observed

"The fact is, of course, notorious to us all, that if anybody studies private international law out of a French law book, he takes one view of it, if he takes an American book, he takes another view, they do not all take the same view."

It may be noted that in Public International Law there is a well established principle which forbids fundamental denial of justice to aliens. It follows that, if a State frames rules under which it refuses to recognize all marriages celebrated outside its jurisdiction and prosecutes them for illicit intercourse if they happen to be within the jurisdiction, the State whose nationals are thus affected will have a right to make strong diplomatic protest and to take appropriate action sanctioned by Public International Law. Thus it is true that no State can act arbitrarily towards aliens.

But, in the present submission, this is merely a negative aspect of the matter. The object of Private International Law is positive. It does not merely postulate that there should not be any denial of justice to aliens, but also that the rights of a person should be recognized everywhere. And, it is submitted, the principle of no denial of justice to aliens would not go to achieve this.

Under these circumstances if the individual States will frame rules for the solution of conflict of cases in accordance with their own notions, there is no rule of international law to forbid them from doing so.

When Despagnet and others of the same school said that the characterization should be governed by the *lex causae* they were true to their premises. They thought that the application of the *lex causae* would yield to the uniformity of rules of conflict of laws. That this was fallacious was obvious. The application of the *lex causae* not only is shrouded with practical difficulties but begs the entire question.

Martin Wolf has tried to answer to this criticism in his own way. But his answer is again defective and fallacious, as the amplification of Wolf does not take out the whole issue from the confusion in which it is bogged.

The nationalists advance from the fundamental assumption of the territorial supremacy of the laws, a theory of 'vested rights', or 'foreign created rights'. Though nationalist in outlook some sort of internationalism has infiltrated into this theory. For, on the assumption that territorial law is sovereign, the protagonists of this theory would have advocated the application of nothing but the internal laws. But, whether motivated by practical considerations or by the exigencies of the situation, they, though not leaving the concept of supremacy of territorial laws, advance to say that it is not the foreign law which is enforced but the foreign acquired rights. This view has found acceptance from the Anglo-American Judges and jurists.

It appears that the Anglo American system accepts the three maxims advanced by Huber as the basis of Private International Law Story approved of the maxims. Dicey and Beale are in substantial agreements with them Beale has opined that the Anglo-American system has worked out an indigenous theory of 'vested rights' Beale's theory appears to be that there is a territorial law applicable exclusively to a particular group of facts which must prevail in determining legal consequences

That this theory in the sphere of Private International Law, though however well founded it might be in the sphere of constitutional law, is not tenable needs no elucidation This theory can neither be supported on logical grounds nor on practical grounds Even if it is assumed that the Courts of the forum enforce foreign acquired rights, nevertheless, it would need an examination of the foreign law under which they have been acquired to know whether they have been legitimately acquired or not There are various foreign acquired rights which are not enforced by the Courts of the forum on the ground that the forum will not take any notice of the law of procedure of a foreign country, or the public policy of the forum may not permit their enforcement Not only this, there are cases in which decisions are given in favour of the plaintiff even though he has not acquired any right under a foreign law It, therefore, clearly appears that the sovereign language might be harmonious with constitutional traditions, but its use in conflict of laws is innocuous It simply goes to denote the absence of limitation on the legislative powers Moreover, it may conveniently be used in the field of judicial jurisdiction to indicate the powers of States independently to define jurisdiction of Courts

The statement that the Courts of the forum enforce only foreign acquired rights is also full of some other difficulties Based as it is on the basis of comity, the Courts of the forum are not bound to enforce the so called foreign acquired rights They can refuse their enforcement not only on the basis of public policy, but also on the basis that they do not fit in the system of the rights recognized and enforced by the forum Thus, in the sphere of characterization invariably leads to the application of the laws of forum To what complication this leads has already been shown in Part II of this paper

Even if it is accepted that each State is sovereign and therefore each has power to attach any legal consequence to a set of certain operative facts, it cannot be denied that certain facts of international life are such which no State in fact, even though theoretically speaking it might be said to possess such a power, can absolutely bank upon its own sovereignty as a means to deny certain legal consequences to them And this is not due to any demand of comity of nations, nor even due to the necessity of international life, but in the interest of a proper administration of justice, a State will, and does, frequently attach to certain operative facts occurring in a foreign country the same legal consequences

Realizing the difficulties, theoretical and practical, inherent in the application of theories of *lex fori* and *lex causae* to the solution of the problem of characterization, and with a view to arrive at socially desirable results in the application of rules of Private International Law, various writers have advanced, as we have seen above, various other theories Some of them, for instance those of Cheshire and Robertson, though seemingly solve some of the difficulties of other theories, plunge the whole problem in some other complications Cheshire, when faced with these

complications and realizing some of the logical difficulties of his theory, suggested a solution which came very near to the application of the theory of *lex fori*. This goes to show how futile and mechanical was his approach when he suggested a division of the whole problem into primary and secondary characterizations. But this also goes to show that probably on a sound and theoretical basis there would not be any solution of the problem. More or less, the same could be said of the allied theory of Robertson.

Now, it is universally admitted that in the process of characterization there are three steps, even though in some cases they may not present any complication, and in others the solution of one stage may automatically lead to the solution of others.

It can also be admitted that the uniform application of one law or another to all stages is a futile approach. But, then, at what stage what law should be applied has again created complications. It still remains a moot point whether invariably the *lex fori* should be applied at the first stage and the *lex causae* should be applied at the third stage, or *vice versa*. The assertion of writers that invariably one law or the other should be applied at a particular stage has, in the present submission, not solved the problem.

Some writers, realizing the difficulty, have observed that at each stage some exceptions should be admitted. For instance, Lorenzen advancing two propositions, viz., first, the question whether a situation is to be classified as one of contract, torts, succession, matrimonial property, etc., is necessarily to be determined by the law of the forum. The foreign institution need not conform strictly to the internal law of the forum, it should be sufficient if it falls within its analytical framework or within some special concept worked out for the purpose of conflict of laws. Second, the same applies to characterization of connecting factor. However, the extent to which the law of the forum accepts the *renvoi* doctrines in the *In re Annesley* sense, the characterization of the connecting factor by the foreign law would prevail. He further suggests that 'as the law of the forum is chosen in the above classes of cases for want of any other practical rule, it should be abandoned whenever some other reasonable solution can be found. For that reason the question whether tangible property is movable or immovable should be determined on the basis of the law of the *situs*. Again, if the fact situation is exclusively connected with foreign States or countries, the law of the forum being interested solely as the place of trial, a common characterization placed upon it by the law of all the foreign States or countries involved should be accepted.

In essence Lorenzen's formulation is practical. It admits that on one single basis the problem of characterization would not admit solution. It advances the proposition that in both the stages whenever there is a possibility of a just solution, the application of the *lex causae* should be abandoned. But in the present submission there is no necessity for advancing the *prima facie* rule that the *lex fori* should apply. This suggestion might be a practical working rule, but its practicability can be jettisoned due to a tendency inherent in it of elevating it to the status of a fundamental rule of law.

Beckett has advanced an entirely different approach. Since in conflict cases the Courts have to choose between the application of internal law in competition to some foreign law or two foreign laws, their endeavour should be to apply a law which would result in a just solution. Thus, Beckett thinks, can be done only by

properly understanding all rules and norms of all foreign systems. He, therefore, asserts, 'classification is simply an interpretation or application of the rules of Private International Law in a concrete case and the conceptions of these rules, therefore, will be conceptions of an absolutely general character.'

According to this view the characterization should be on the basis of analytical jurisprudence and comparative law. This view has the merit that all the formidable objections which are presented by other theories are solved. It neither advances a proposition that at different stages different laws should be applied, nor does it dogmatically assert that the *lex fori* or the *lex causae* should be applied, nor does it advance the proposition that there are certain *prima facie* rules, and whenever it is necessary certain exceptions should be admitted. Though no doubt it suggests that at all stages of characterization the rules of comparative law should be applied, yet it does not lead to dogmatism which is inherent in the theories of the *lex fori* and the *lex causae*. Since it does not assert that one law or other should be applied.

The only serious objection made to this theory is that even though it may be sound in theory, it is most unsound in practice, as there are very few rules of universal application, and the study of comparative law in every case would put so much burden on the Judges that they would not be able to cope with it.

There is no doubt that there are certain working difficulties in this theory. But the question is are they so huge that for those reasons the theory has to be abandoned?

Falconbridge has advanced a view which is in between the two extreme views, the characterization on the basis of the *lex fori*, and the characterization on the basis of the *lex causae*. He suggests that the forum should consider all the potentially applicable laws before arriving to a conclusion that this or that rule of law is applicable. He holds that it is not the factual situation which is characterized, but it is a juridical situation. 'A purely factual situation dissociated from any particular system of law has no legal consequences, that is, it creates no legal rights, no legal obligations, the object of rules of conflict of laws is to furnish a guide as to the particular system of law which should be applied to the facts of the situation, for the purpose of deciding what, if any, legal consequences follow from the factual situation, and a rule of conflict of laws furnishes the necessary guide by specifying the connecting factor or place element of the situation which connects the factual situation with a particular country and its system of law. The question what it is that must be characterized cannot indeed be divorced from the question what is characterization itself, and the further question by what law the characterization should be governed. An answer to all these questions is essential to the understanding of the meaning and operation of any rules of conflict of laws.'

Thus on the basis of the above principle the process of characterization is made much flexible. It is also free from the dogmatism of other theories.

Falconbridge's criticism of various theories, for instance, his argument that there is no distinction in principle between the characterization of the question and the characterization of rules of law leads to the inevitable conclusion that there is no justification for the classification of the problem into primary and secondary characterization. Falconbridge's criticism of Beckett's theory, on the other hand, appears to be rather superfluous. When examined critically both the approaches lead to the

same result. What they both stress is that the process of characterization, instead of being dogmatic, should be as elastic as possible. Falconbridge's assertion that all potentially applicable rules of all systems should be first examined by the forum, comes very near to the assertion of Beckett that all rules applied should be on the basis of comparative law.

The present writer is in total agreement with Beckett and Falconbridge when they say that the rules should be as flexible as possible and that in our approach to the problem of characterization we should be as little dogmatic as possible, for in our submission in the present stage of development of the rules of Private International Law, and due to it being a territorial law, it would not be possible, however we may desire to arrive at a theoretically sound solution.

Therefore our endeavour should be primarily to arrive at a socially desirable result rather than to a theoretically sound result. If this would be done the problem of *renvoi* would not also present many difficulties.

If our Courts would adopt some such line to the solution of cases of Private International Law, it is hoped that ultimately we may be in a position to lay the foundation of Private International Law on a much sounder basis than has been done in the United States or in Britain or even on the continent of Europe.

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA, S R DAS, VIVIAN BOSE AND GHULAM HASAN, JJ

Jai Ram

Appellant*

v

Union of India

Respondent

Fundamental Rules, Chapter IX rule 56—Ministerial servant—If entitled to remain in service till he reaches the age of sixty years—Such servant obtaining leave preparatory to retirement as on his completing fifty-five years—Cannot ask subsequently for cance lat on of his retirement and insist on remaining in service till sixtieth year—Government of India Act (1935) section 240 (3)—Applicability

Rule 56 (b) (1) of Chapter IX of the Fundamental Rules which speaks of a ministerial servant being ordinarily retained in service till sixty does not contemplate a case where such servant was granted an application for leave preparatory to retirement on the basis of his retiring from service on his completing his fifty fifth year. The rule does not preclude a ministerial servant from waiving by express agreement a right to which he might otherwise have been entitled under that rule. When a servant has attained the age of fifty five years and for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement it will be a useless formality to ask him to show cause as to why his services should not be terminated. Section 240 (3) of the Government of India Act 1935, could not have any possible application in such circumstances.

It is open to a servant who has expressed a desire to retire from service and applied to his superior officer to give him the requisite permission to change his mind subsequently and ask for cancellation of the permission thus obtained but he can be allowed to do so so long as he continues in service and not after it has been terminated.

A servant whose service ceased and is on post retirement leave subsequent to that date granted under the special circumstances mentioned in Fundamental Rule 86 could not be held to continue in service and it was no longer competent to him to apply for joining his duties even though the post retirement leave had not run out.

Appeal by special leave against a judgment of a Letters Patent Bench† of the High Court of Punjab dated 10th July 1952, reversing on appeal a decision of a single Judge of that Court passed in Second Appeal No 884 of 1950.

H J Umrigar, Advocate, for Appellant

C K Dabhtary, Solicitor General for India (*G N Joshi* and *Porus A Mehta*, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

B K Mukherjea, J—This appeal which has come before us on special leave obtained by the plaintiff appellant, is directed against a judgment† of a Letters Patent Bench of the High Court of Punjab dated the 10th July, 1952, reversing, on appeal, a decision of a single Judge of that Court passed in Second Appeal No 884 of 1950.

The suit, out of which the appeal arises, was commenced by the plaintiff, in the Court of the Subordinate Judge at Ambala for a declaration that the order passed by the Government of India, which is the defendant in the suit, retiring the plaintiff from his service was wrongful void and inoperative and that the plaintiff should be deemed to continue still in the service of the defendant.

The material facts, which are for the most part uncontroverted, may be shortly narrated as follows

* C.A. No 11 of 1953

The plaintiff entered the service of the Government of India as a clerk in the Central Research Institute at Kasauli on the 7th of May, 1912. Under rule 56 (b) (i) of Chapter IX of the Fundamental Rules, which regulate the civil services, a ministerial servant may be required to retire at the age of 55 but should ordinarily be retained in service if he continues efficient, till the age of 60 years.

The plaintiff was to complete 55 years on the 26th November, 1946. It appears, however, that in 1945 he himself was anxious to retire from service and on the 7th of May, 1945, wrote a letter to the Director of the Institute to the following effect :
" Sir,

Having completed 33 years' service on the 6th instant I beg permission to retire and shall feel grateful if allowed to have the leave admissible.

This permission was not granted by the Director of the Institute on the ground that the plaintiff could not be spared at that time. The plaintiff renewed his prayer by another letter dated the 30th May 1945. In that letter it was stated that owing to the untimely death of his brother, his family circumstances did not permit him to serve the Institute any longer. He, therefore, prayed for leave preparatory to retirement—four months on average pay and the rest on half average pay—from 1st of June, 1945, or the date of his availing the leave, to the date of superannuation which was specifically stated to be the 26th of November, 1946.

The letter plainly indicates that the impression in the mind of the plaintiff was that he was due to retire on the 26th of November, 1946 and all that he wanted was that he might be granted leave preparatory to retirement from 1st of June, 1945 or as early as possible after that. This time also the plaintiff's prayer was refused and the Head of the Institute endorsed a note on his application that he could not be spared.

A third application was presented by the plaintiff on the 18th of September, 1945, praying for reconsideration of his petition and urging one additional ground in support of the same, namely, that the war was already at an end. This application too shared the fate of its predecessors and the Director of the Institute did not agree to his retirement.

After this the plaintiff kept silent for nearly 8 months and on the 28th May, 1946, he made his fourth application which, it appears, met with a favourable response. In this application also it was stated that the plaintiff would attain the age of 55 years on the 27th of November, 1946 and he prayed, therefore, that the full amount of preparatory leave, as was admissible to him under the rules, might be granted to him. The Director of the Institute sanctioned the leave and the question as to how much leave and of what kind would be available to him was left to the decision of the Accountant General, Central Revenues.

On the 11 of July, 1946, the Accountant General communicated his order to the Director of the Institute and his decision was that the plaintiff was entitled to leave preparatory to retirement on average pay for six months from 1st June, 1946 to 30th November, 1946 and on half average pay for five months and twenty-five days thereafter, the period ending on 25th of May, 1947.

Just 10 days before this period of leave was due to expire, the plaintiff on the 16th of May, 1947, sent an application to the Director of the Institute stating that he had not retired and asked for permission to resume his duties immediately. The Director informed him in reply that he could not be permitted to resume his

duties, as he had already retired, having voluntarily proceeded on leave preparatory to retirement

The plaintiff continued to make representations but ultimately the matter was concluded so far as the Government of India was concerned by a letter dated the 28th of April, 1948, in which it was stated that the plaintiff having availed himself of the full leave preparatory to retirement due to him and having actually retired from service of his own volition, the question of his having any right to return to duty and to continue service till the age of 60 years did not at all arise. It was in consequence of this letter that the present suit was filed by the plaintiff on the 5th July, 1949.

The legality of the Government communication mentioned above has been attacked in the plaint substantially on a two fold ground. The first ground alleged is, that under rule 56 (b) (i) Chapter IX of the Fundamental Rules, the age of retirement is not 55 but 60 years. The rule no doubt gives the Government a right to retire a ministerial servant at the age of 55, but that can be done only on the ground of his inefficiency. Consequently before a servant coming within that category is required to retire at 55, it is incumbent upon the Government to give him an opportunity to say what he has to say against this premature retirement in accordance with the provision of section 240 (3) of the Government of India Act, 1935 and unless this is done, the order terminating his service cannot be held to be valid.

The other contention is, that although the plaintiff on his own application obtained leave preparatory to retirement yet there was nothing in the rules which prevented him from changing his mind at any subsequent time and expressing a desire to continue in service provided he indicated this intention before the period of his leave expired.

The trial Court negatived both these contentions and dismissed the plaintiff's suit. In the opinion of the Subordinate Judge it was discretionary with the Government under Fundamental Rule 56 (b) (i) either to require a ministerial servant to retire at 55 or to allow him to continue in service till 60 and there was no breach of statutory obligation in this case by reason of the fact that the plaintiff was made to retire before the age of 60.

On the other point the Subordinate Judge held that there was no statutory rule under which a Government servant could claim to resume his previous duties as a matter of right by merely choosing to return before the expiry of the period of his leave. This could be done only with the permission of the superior authority which was absent in the present case.

This decision of the trial Court was affirmed on appeal by the District Judge at Ambala. The plaintiff thereupon took a second appeal to the High Court of Punjab and the appeal was heard by *Falshaw J.*, sitting singly. The learned Judge allowed the appeal, upholding both the contentions raised by the plaintiff and decreed the suit.

Against this decision there was a further appeal to a Bench of the same High Court under clause 10 of the Letters Patent and the Letters Patent Bench reversed the judgment of the single Judge and dismissed the plaintiff's suit. The plaintiff has now come up to this Court and *Mr. Umrigar*, who appeared in support of the appeal, reiterated before us both the contentions that were pressed on behalf of his client in the Courts below.

As regards the first point, Mr Umrigar lays stress mainly upon rule 56 (b) (i) of Chapter IX of the Fundamental Rules which is worded as follows

"A ministerial servant who is not governed by sub clause (u) may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient, up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing and with the sanction of the local Government."

We think that it is a possible view to take upon the language of this rule that a ministerial servant coming within its purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient. We may assume, therefore, for purposes of this case that the plaintiff had the right to continue in service till 60 and could not be retired before that except on the ground of inefficiency. But that by itself affords no solution of the question that requires consideration in the present case.

Here the plaintiff was not compelled or required to retire by anybody. If the Government required him to retire in terms of the Fundamental Rule 56 (b) (i), it might be argued that he should have been given an opportunity to show that he was still efficient and able to discharge his duties and consequently could not be retired at that age. But here the situation was entirely of the plaintiff's own seeking and his own creation.

Ever since May, 1945, when he had not even completed his 54th year, the plaintiff began making importunate requests to his official superior to allow him to retire from service. It will be noticed that in his first application he mentioned the fact of his having completed 33 years of service as a ground for obtaining the permission prayed for. There is, in fact, a rule in the Civil Service Regulations under which a retiring pension is granted to an officer who is permitted to retire after completing service for 30 years. It is not clear whether this rule which relates to superior service was at all applicable to the plaintiff. But it is a fact that in his applications for leave preparatory to retirement he laid great stress on two facts, one of which was the length of his service and the other that he was to reach the age of superannuation in November, 1946.

Ultimately when his application was granted, the leave, which was allowed to him, was on the basis of his retiring from service on the 27th November, 1946. He was given post retirement leave for a period of about six months from that date in terms of rule 86, Chapter X of the Fundamental Rules on the ground that he had previously applied for leave which was at his credit but it was refused on the ground of requirements of public service. The plaintiff could not have got this period of leave except on the footing that his service ended on the 27th November, 1946. Rule 56 (b) (i), which speaks of a ministerial servant being 'ordinarily' retained in service till 60, does not, in our opinion, contemplate a case of this description and does not preclude a ministerial servant from waiving, by express agreement, a right to which he might otherwise have been entitled under this rule.

When a servant has attained the age of 55 years and for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement, we consider it to be a useless formality to ask him to show cause as to why his service should not be terminated. Section 240 (3) of the Government of India Act, 1935, could not have any possible application in such circumstances. The first contention of the appellant must, therefore, in our opinion fail.

In view of our decision on this point, the other point practically loses its force. It may be conceded that it is open to a servant, who has expressed a desire to retire from service and applied to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained, but he can be allowed to do so so long as he continues in service and not after it has terminated.

As we have said above, the plaintiff's service ceased on the 27th of November, 1946, the leave which was allowed to him subsequent to that date, was post retirement leave which was granted under the special circumstances mentioned in Fundamental Rule 86. He could not be held to continue in service after the 26th of November, 1946 and consequently it was no longer competent to him to apply for joining his duties on the 16th of May, 1947, even though the post-retirement leave had not yet run out. In our opinion, the decision of the Letters Patent Bench of the High Court is right and this appeal should stand dismissed. In view of the fact that the plaintiff is a pauper and has not been permitted to draw his pension as yet, we make no order as to costs.

Agent for Appellant *Nautilal*

Agent for Respondent *R H Dheoar*

Appeal dismissed

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN, Chief Justice, S R DAS, N H BHAGWATI, B JAGANNADHADAS AND T L VENKATARAMA AYYAR, JJ

The Dominion of India (now the Union of India) and another *Appellants**
v
 Shrinbai A Irani and another *Respondents*

Requisitioned Land (Continuance of Powers) Ordinance (XIX of 1946) clause 3—Construction—Applicability to requisition of immovable property due to expiry otherwise than under the Defence of India Act and Rules

Whatever might have been the presumed or expressed intention of the legislating authority when enacting Ordinance XIX of 1946 the words of clause 3 read along with the definition of 'requisitioned land' contained in clause 2 (3) of the Ordinance are quite clear and it would not be within the province of the courts to speculate as to what was intended to be covered by clause 3 of the Ordinance when the only interpretation which could be put upon the terms thereof is that 'all requisitioned lands that is all immovable properties which when the Defence of India Act 1939, expired was subject to any' requisition (whether the requisition was for a limited period or for an indefinite period) effected under the Act and the Rules were to continue to be subject to requisition until the expiry of the Ordinance. Even those requisition orders which by accident or design were to expire on 30th September 1946 would come to an end not only because the fixed term expired on that date but also because the Act and the Rules expired on that date and were therefore covered by clause 3 read along with the definition in clause 2 (3) of the Ordinance and were by the clear terms thereof continued until the expiry of the Ordinance.

Appeal by special leave from a judgment of the High Court of Judicature at Bombay in Appeal No 117 of 1952 dated 8th January, 1952

M C Setalvad Attorney General for India and *C K Dabhtary*, Solicitor-General for India (*Perus A Mehta*, Advocate, with them), for Appellants

N A Palkhivala and *S P Varma*, Advocates, for Respondent No 1

The Judgment of the Court was delivered by

Bhagwati, J—This appeal by special leave from a judgment of the High Court of Jud cature at Bombay in Appeal No 117 of 1952 raises a short point as to the construction of clause 3 of the Requisitioned Land (Continuance of Powers) Ordinance, 1946

The suit out of which this appeal arises was commenced by the first respondent against the appellants and the second respondent for delivery of vacant and peaceful possession of the three shops situated on the ground floor of the premises known as "Iran Manzil". The first respondent was the owner of the said immovable property which had been requisitioned on 15th April, 1943, by the Collector of Bombay in exercise of the powers conferred upon him by rule 75-A (1) of the Defence of India Rules read with the Notification of the Government, Defence Co-ordination Department No 1336/OR/1/42, dated 15th April, 1942

The order of requisition was in the following terms

Order No M S C 467/H—Whereas it is necessary for securing the public safety and the efficient prosecution of the war to requisition the property specified in the Schedule hereto appended

I M A Faruqui the Collector of Bombay, do hereby requisition the said property and direct that possession of the said property be delivered forthwith to the Food Controller, Bombay subject to the following conditions

(1) The property shall be continued in requisition during the period of the present war and six months thereafter or for such shorter period as may be specified by the Food Controller, Bombay

The said premises were used for the purpose of housing the Government Grain Shop No 176

By a letter dated 30th July, 1946/17th August, 1946, the Controller of Government Grain Shops Bombay wrote to the first respondent that as the validity of the requisitioning order was to expire on 30th September, 1946, the first respondent should allow the Department to remain as her tenants in respect of the premises. The first respondent replied by her Advocate's letter dated 27th August, 1946, offering the tenancy to the Department on certain terms. These terms were not accepted but the occupation of the premises continued even after 30th September, 1946 and the first respondent complained about such occupation after the period of requisition of the said shops had come to an end and also complained that it was contemplated to transfer the said shops to a private party or concern without any reference to her in the matter

By her Advocate's letter dated 29th August, 1947, she gave to the Collector of Bombay a notice to vacate the said shops giving him two clear calendar months' time and asking him to deliver over to her peaceful and vacant possession of the said shops. The Controller of Government Grain Shops, Bombay, wrote to the first respondent on 1st October, 1947, that the second respondent was being handed over the Government Grain Shop No 176 and that she should give her consent to the electric connection to be carried out in the said shops by the second respondent. The first respondent refused to give her consent and protested against the contemplated action. The Collector of Bombay by his letter dated 15th January, 1948, intimated to the first respondent that the requisitioning of the said shops was continued after 30th September, 1946, by Act XVII of 1947 and as possession of the said shops had been handed over to the second respondent vacant possession of the same could not be given to the first respondent,

Further correspondence ensued between the first respondent's Attorneys and the Collector of Bombay in the course of which the Collector of Bombay admitted that the said shops had been sublet to the second respondent but contended that the maintenance of essential supplies was the purpose for which the premises in question were requisitioned and that as the second respondent continued to serve the same purpose the first respondent was not entitled to peaceful and vacant possession of the premises. The first respondent therefore filed a suit on the original side of the High Court of Judicature at Bombay being Suit No. 235 of 1949 claiming vacant and peaceful possession of the premises as also compensation for wrongful use and occupation thereof till delivery of possession was given over to her.

The appellants were impleaded as defendants 1 and 2 in the said suit and the second respondent was impleaded as the third defendant. The suit was contested by the appellants. The second respondent did not file any written statement nor did he contest the suit.

The first respondent contended that the requisitioning order had expired that the property was no longer under requisition and therefore the possession by the Government was wrongful. She next contended that the order was made for a specific purpose and as that purpose no longer obtained the order was no longer operative. She further contended that after August 1947, the user of the property was not by the appropriate Government, viz., the Dominion of India but was by the State Government. She also contended that the requisitioning order had ceased to be operative by reason of Act IX of 1951.

The trial Judge, Mr. Justice Coyajee, upheld all these contentions of the first respondent and decreed the suit. The appellants preferred an appeal against that decision and the Court of Appeal confirmed the decree passed by the trial Court on the short point as to whether clause 3 of Ordinance XIX of 1946 had the effect of continuing the requisitioning order. It affirmed the conclusion of the trial Court that there was no further extension of the duration of the requisitioning order by the provisions of clause 3 of the Ordinance and declined to go into the other questions which had been mooted before the trial Court and which had been decided by the trial Court in favour of the first respondent. The appellants not being satisfied with that judgment applied for leave to appeal to the Supreme Court, but the High Court rejected that application. The appellants thereupon applied for and obtained special leave under Article 136 of the Constitution.

It is common ground that the Defence of India Act, 1939 (XXXV of 1939) and the rules made thereunder were to expire on 30th September, 1946. Various immoveable properties had been requisitioned in exercise of the powers conferred by sub-rule 1 of rule 75 A of Defence of India Rules and all these requisitioning orders would have come to an end and the immoveable properties released from requisition on the expiration of the Defence of India Act and the rules made thereunder. The requisitions had to be continued and an emergency arose which made it necessary to provide for the continuation of certain powers theretofore exercisable under the said Act and the said Rules and the Governor General in exercise of the powers conferred by section 72, Government of India Act, promulgated on 26th September, 1946, an Ordinance being Ordinance XIX of 1946, the relevant provisions of which may be set out hereunder.

Ordinance No. XIX of 1946—An Ordinance to provide for the continuance of certain emergency powers in relation to requisitioned land. Whereas an emergency has arisen which makes it necessary to provide in relation to land which when the Defence of India Act, 1939 (XXXV of 1939) expires is subject to any requisition effected under rules made under that Act, for the continuance of certain powers theretofore exercisable under the said Act or the said rules the Governor General is pleased to make and promulgate the following Ordinance

Section 2 Definitions

(3) Requisitioned land means immovable property which when the Defence of India Act, 1939 (XXXV of 1939) expires is subject to any requisition effected under the rules made under this Act

Section 3 Continuance of requisitions.—Notwithstanding the expiration of the Defence of India Act, 1939 (XXXV of 1939) and the rules made thereunder all requisitioned lands shall continue to be subject to requisition until the expiry of this Ordinance and the appropriate Government may use or deal with any requisitioned land in such manner as may appear to it to be expedient

It is clear from the Preamble as also clause 3 of the Ordinance that the occasion for the enactment of the Ordinance was the impending expiration of the Defence of India Act, 1939 and the Rules made thereunder. All the requisition orders which had been made under the Act and the Rules would have ceased to be operative and come to an end with the expiration of the Act and the Rules and the immovable properties which had been requisitioned thereunder would have been released from such requisition. It was in view of that emergency that the Ordinance came to be promulgated and the obvious object of the enactment was to provide for the continuance of the powers exercisable under the Act and the rules and to continue the requisitions of immovable properties which had been made thereunder.

It was therefore argued that those requisition orders which would cease to be operative and come to an end with the expiration of the Act and the Rules were the only orders which were intended to be continued by virtue of clause 3 of the Ordinance and clause 3 would accordingly cover only such requisition orders as would have ceased to be operative and come to an end with the expiration of the Act and the Rules and not those orders which by reason of their inherent weakness such as the limitation of the period of duration expire *'ipso facto'* on the date of expiration of the Act and the Rules. The latter category of orders would have ceased to be operative and come to an end by reason of the limitation placed on the period of duration within the terms of the orders themselves and their expiration would not have depended upon the expiration of the Act and the Rules and were therefore not touched by clause 3 of the Ordinance.

That this was the true construction of clause 3 of the Ordinance was further sought to be supported by the *non-obstante* clause appearing therein, viz:

"notwithstanding the expiration of the Defence of India Act, 1939 (XXXV of 1939) and the Rules made thereunder

The *non-obstante* clause was invoked in support of the submission that those orders which would have ceased to be operative and come to an end with the expiration of the Act and the rules were the only orders which were intended to be continued under clause 3 of the Ordinance.

There is considerable force in the argument and it found favour with the trial Court as well as the Court of Appeal. It was recognised that but for the *non-obstante* clause the plain wording of the Ordinance was capable of covering the order in dispute.

The Preamble in so far as it could be drawn upon for the purpose showed that the Ordinance was being enacted to provide for the continuation of certain powers in relation to land which was subject to 'any' requisition effected under the Act and the Rules. The definition of requisitioned lands contained in clause 2 (3) also covered immoveable property which when the Defence of India Act, 1939, expired was subject to 'any' requisition effected under the Act and the Rules. Clause 3 of the Ordinance covered 'all' requisitioned lands which having regard to the definition abovementioned covered immoveable properties which when the Defence of India Act, 1939, expired were subject to 'any' requisition effected under the Act the Rules and such requisitioned lands were to continue to be subject to requisition until the expiry of the Ordinance.

On a plain and grammatical construction of these provisions it was obvious that once you had an immoveable property which when the Defence of India Act expired, that is on 30th September, 1946, was subject to any requisition effected under the Act and the Rules, that immoveable property continued to be subject to requisition until the expiry of the Ordinance, no matter whether the requisition order to which the immoveable property was subject was of a limited duration or an indefinite duration. The only test was whether the immoveable property in question was on 30th September, 1946, subject to any requisition effected under the Act and the Rules. This construction was sought to be negated by having resort to the *non obstante* clause which it was submitted, restricted the operation of clause 3 of the Ordinance only to those cases where the requisition order would have ceased to be operative or come to an end merely by reason of the expiration of the Act and the Rules.

If there was in existence on 30th September, 1946, any requisition order which would have ceased to be operative or come to an end by reason of the fact that it was limited in duration and was to expire on 30th September, 1946, the *non-obstante* clause saved that from the operation of clause 3 of the Ordinance and such requisition order could not continue in operation until the expiry of the Ordinance as therein provided. Such orders could not have been in the contemplation of the legislative authority because they would cease to be operative and come to an end by reason of the inherent weakness of the orders and not by reason of the fact that the Act and the Rules were to expire on 30th September, 1946 and it would not be at all necessary to make any provision for the continuance of such requisitions, because they could never have been intended to be continued.

While recognising the force of this argument it is however necessary to observe that although ordinarily there should be a close approximation between the '*non obstante*' clause and the operative part of the section, the *non-obstante* clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a *non obstante* clause cannot cut down the construction and restrict the scope of its operation. In such cases the *non-obstante* clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. Whatever may have been the presumed or the expressed intention of the legislating authority when enacting Ordinance XIX of 1946 the words of clause 3 read along with the definition of requisitioned land contained

in clause 2 (3) of the Ordinance are quite clear and it would not be within the province of the Courts to speculate as to what was intended to be covered by clause 3 of the Ordinance when the only interpretation which could be put upon the terms thereof is that all requisitioned lands, that is, all immoveable properties which when the Defence of India Act, 1939, expired were subject to 'any' requisition effected under the Act and the Rules were to continue to be subject to requisition until the expiry of the Ordinance.

No doubt measures which affect the liberty of the subject and his rights to property have got to be strictly construed. But in spite of such strict construction to be put upon the provisions of this Ordinance one cannot get away from the fact that the express provisions of clause 3 of the Ordinance covered all cases of immoveable properties which on 30th September, 1946, were subject to 'any' requisition effected under the Act and the Rules, whether the requisition was effected for a limited duration or for an indefinite period. Even those requisition orders, which by accident or design were to expire on 30th September, 1946, would come to an end not only because the fixed term expired but also because the Act and the Rules expired on that date and were therefore covered by clause 3 read along with the definition in clause 2 (3) of the Ordinance and were by the clear terms thereof continued until the expiry of the Ordinance.

We are not here concerned with the equities of individual cases. There may be cases in which the Ordinance worked to the prejudice of the owner of the requisitioned land. In such cases the necessary relief could be granted by the appropriate Government by releasing the immoveable property from requisition. But the Court would be helpless in the matter. Once the conclusion was reached that a particular measure was lawfully enacted by a legislative authority covering the particular case in question the hands of the Court would be tied and the legislative measure would have to be given its legitimate effect, unless '*mala fides*' or abuse of power were alleged.

We have therefore come to the conclusion that both the trial Court and the Court of Appeal were in error when they reached the conclusion that clause 3 of the Ordinance had not the effect of continuing the requisition order in question.

Mr Palkhivala at the close of the arguments appealed to us that his client was a petty landlady and the immoveable property which she owned was of a small value and the result of an order of remand would be to put her to further harassment and costs. He pointed out to us that he had particularly requested the Court of Appeal not to decide the appeal merely on the short point in regard to the construction of clause 3 of the Ordinance, but to decide it on all the points which had been canvassed before the trial Court. But the Court of Appeal turned down his request and decided the appeal only on that point stating that it was unnecessary to go into the other points which Mr Palkhivala wanted to urge before it. It is to be regretted that the Court of Appeal did not respond to Mr Palkhivala's request, but we have not had the benefit of the judgment of the Court of Appeal on those points which found favour with the trial Court and which were not considered by the Court of Appeal and we cannot help remanding the matter to the Court of Appeal with a direction that the appeal be disposed of on all the points which were dealt with by the trial Court.

It was unfortunate for the first respondent to be pitted against the appellants who considered that this was a test case and the matter had to be fought out in

detail inasmuch as it affected a series of cases and the properties involved would be considerable as alleged by Mr Seervai before the trial Court. We are not concerned with the policy of the appellants in making test cases of this character. The only thing that impresses us in this case is that the unfortunate first respondent has had to bear the brunt of the battle and has been worsted in this preliminary point which was found in her favour both by the trial Court and the Court of Appeal. We cannot make any order for costs in her favour. But we think that the justice of the case requires that the appellants as well as the first respondent will bear and pay their own respective costs both here and in the Court of Appeal.

We therefore allow the appeal, set aside the decree passed by the Court of Appeal and remand the Appeal No 117 of 1952 for hearing and final disposal by the Court of Appeal on the other points which have been raised in the matter after hearing both the parties. There will be no order as to costs here as well as in the Court of Appeal.

Agent for Appellant *R H Dhebar*

Agent for Respondent No 1 *R. A Gagrai*

Appeal allowed.

TABLE OF CASES REPORTED.

SUPREME COURT OF INDIA

PAGES

Dominion of India v Shrinbai A Irani

(S C) 813

Jai Ram v Union of India

(S C) 809

INDEX TO REPORTS

Fundamental Rules Chapter IX rule 56—Ministerial servant—If entitled to remain in service till he reaches the age of sixty years—Such servant obtaining leave preparatory to retirement as on his completing fifty five years—Cannot ask subsequently for cancellation of his retirement and must on remaining in service till sixtieth year—Government of India Act (1935), section 240 (3)—Applicability (S C) 809

Requisitioned Land (Continuance of Powers) Ordinance (XIX of 1946) clause 3—Construction—Applicability to requisition of immovable property due to expire otherwise than under the Defence of India Act and Rules (S C) 813

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CONTENTS

	PAGES.
Articles ..	239—249
Reports ..	815—857

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[XVII]

THE LATE MR JUSTICE GHULAM HASAN

It is with the deepest regret that we have to record the rather sudden death on Friday, the 5th November, 1954 of Mr Justice Ghulam Hasan, Judge of the Supreme Court of India, after a brief illness

Besides his eminence as a lawyer he took a keen interest in many humanitarian, educational and cultural institutions. He was cultured, amiable and always cheerful. His courtesy to the Bar was unfailing. By his death the Judiciary as well as the public has sustained a great loss. We offer our condolences to the members of the bereaved family.

A MEMOIR

"Sri Ghulam Hasan was born in July, 1891. After a distinguished career at the University and at the Lucknow Bar of which he was a leading member, he was appointed a Judge of the Oudh Chief Court in 1940 and later became the Chief Justice there. On the amalgamation of the Oudh Chief Court and the Allahabad High Court in 1948, he became a Judge of the new High Court. In 1949 he was selected by the Government of India to preside over the Dargah Khwaja Saheb (Ajmer) Inquiry. After his retirement from the Allahabad High Court in the year 1951, he was appointed a member of the Labour Appellate Tribunal. Finally, on the 8th September, 1952, he was appointed a Judge of the Supreme Court of India.

"Sri Ghulam Hasan was a man of varied interests. Before his appointment as a Judge he was a member of the United Provinces Legislative Assembly for a period of two years. He also took a keen interest in humanitarian work and was Chairman of the Executive Committee of the U.P. Branch of the Red Cross and St. John Ambulance Association since 1942. Amidst all these activities he found time to devote to the cause of education also and he was an active member of the Court of Aligarh University as well as its Executive Committee.

By his death the Supreme Court and the country have lost a learned, distinguished and esteemed Judge who was a credit to the highest Judiciary in the land "

REFERENCE IN SUPREME COURT

In the Supreme Court of India on Friday the 5th November, 1954, Chief Justice Mr Mehrchand Mahajan made a moving reference to the death of Mr Justice Ghulam Hasan and said " We have lost an esteemed colleague and a learned, just and upright Judge, and the country had lost a patriotic and great citizen "

The Chief Justice continued that when he met the ailing Judge at his house on Wednesday evening, he was quite cheerful and looked well. He had told the Chief Justice that he would in all likelihood attend the Court on Friday and failing that on Monday.

" On Thursday morning his condition had much improved but late in the evening he felt uncomfortable and was removed to hospital where he suddenly collapsed. This is in short the story of the termination of a successful career at the Bench and the Bar of a very devoted and patriotic citizen of India," the Chief Justice added.

The Court hall was packed with the members of the Supreme Court Bar and all the Judges of the Court were present.

The Chief Justice concluded, " Both as a member of the Bar and the Bench Mr Ghulam Hasan distinguished himself by his vast learning, his sense of detachment and high judicial integrity. He was always courteous and patient in his relations with the Bar as in his relations with his colleagues. If I may say so, courtesy was writ large on his face. His full grasp of facts, his thorough knowledge of law and his quick perception of the real points in a case were of great assistance to us in dealing with the many complicated questions that arose for determination in this Court. He had a singularly equable and gentle temperament. His simple and unaffected manners attracted friends in every sphere and he will be very much missed not only by me and his colleagues in this Court but also in the social life of this city, which would be distinctly the poorer by his loss "

The Attorney-General, Mr M C Setalvad, on behalf of the Bar, said that the members of the Bar would " never forget the keen practical sense which Mr Ghulam Hasan brought to bear on all questions that came before him, the patience with which he heard them and the invariable kindness he showed to them "

The Supreme Court remained closed on Friday as a mark of respect to the deceased.

REFERENCE IN MADRAS HIGH COURT

A reference was also made on Friday the 5th November, 1954, at the Madras High Court before their Lordships the Chief Justice and Mr Justice Rajagopala Iyengar

The Chief Justice Mr P V Rajamannar said that he received that morning the sad news of the sudden death of Mr Justice Ghulam Ha an Mr Hasan was for a long time the Chief Justice of the Oudh High Court, till July, 1948 When the Court was amalgamated with the Allahabad High Court, he became one of the senior Puisne Judges of the High Court and continued to occupy that place In September, 1952, he was appointed as a Judge of the Supreme Court

His Lordship recalled his association with Ghulam Hasan and said that Mr Hasan was interested in things other than law also He particularly associated himself with every organisation doing social work He was also the Chairman of the Provincial Red Cross and St John Ambulance Association and took keen interest in educational institutions As a man, Mr Hasan was most charming and cultured He was always cheerful, genial and cordial The Judiciary as well as the public had suffered a great loss in his death

Mr V K Thiruvengkatachari the Advocate General of Madras, on behalf of the Bar, associating himself with the sentiments expressed by the Chief Justice remarked that the members of the Bar who had had the opportunity to argue before Mr Hasan always found him patient and courteous

After the reference the Court adjourned for one hour as a mark of respect to the memory of the late Mr Ghulam Hasan

THE ROLE OF THE SECURITY COUNCIL AND THE VETO.

By

PARAS DIWAN, LL.M

By applying the veto at the 61st time in the Security Council on the Guatemala case the Soviet Union has once again provided the West with an opportunity to assert that the sword of veto hangs naked on each and every issue before the Security Council, which makes its power inert ineffective and useless and which makes the Security Council an impotent organ of the United Nations Organization this time the use of the veto has been dubbed as a sinister soviet design on the American Continents the Soviet intervention marching forward towards the Western Hemisphere

That the use of veto by the Soviet Union on the Guatemala case was, like the earlier one on the Thai resolution on Indo China, necessary and the minimum that could have been done for the republic of Guatemala which was groaning under the heavy weight of aggressor, is clearly demonstrated by the facts as they have operated in the Republic even though the representative of the Republic in the United Nations has refrained from making any pointed reference to the complicity of the United States in the aggression, the evidence of that is too patent to go unobserved and unnoticed this has been summed up very succinctly in the very pertinent question of the Guatemala's Charge d'Affaires in Washington Where have the planes which bombed the Republic come from?

Under these circumstances the Brazilian Columbian Resolution asking the Security Council that the case should be referred to the Organization of the American States for settlement is not only against the basic principles of natural justice—the member of that organization the U S A and the Latin American States being impleaded in the aggression and consequently being party to the dispute— but also against the fundamental provision of the United Nations which lays down that the Security Council is the supreme and the best organ to resolve war and to remove threat to peace anywhere in the world

Thus the issue of aggression on Guatemala once again brings to the fore the two vital questions concerning the U N Organization

(i) The Security Council as the guardian in chief of the world security and peace and

(ii) The veto the balancer of power

THE GUARDIAN IN CHIEF

Since the fundamental objective of the U N is to maintain international peace and security, the U N Charter purports to attain this by clothing the Security Council with powers in that respect and by providing a system of collective security It is the obligation of the member nation not to commit a breach of international peace

However this obligation not to break the international peace goes deeper than the obligation arising out of the membership of the U N. Prior to the U N Charter under the international law this obligation was inherent. That this was so was further laid down by the judges at Nuremberg trials. According to them a breach of international peace by initiation of war of aggression is the supreme international crime and the one for which those who control the destinies of aggressor state are personally and individually liable quite apart from any liability which may be imposed upon the resources of the aggressor state itself as a result of losing the war of aggression.

The Security Council is empowered not only to determine the existence of any threat to peace, breach of peace or an act of aggression but also to make recommendations or decide what measures should be taken to maintain or restore peace and check aggression. The basic departure from all organizations so far conceived lies in the provision that now the Security Council itself can take any action including military action against an enemy of peace and that action will not be the action of the individual members whose forces participate in the action nor will it be the action of the Security Council or its members but it shall be considered the action of the United Nations. It will be the United Nations which will go to quell the aggressor to restore international peace. In this provision lies the strength of the U N. If the Security Council has not taken any decision to act no member of the U N is empowered to act on its own initiative except in the case of self defence. But once the Security Council decides to take an action the action is binding on the members of the U N. It is a legal obligation non compliance of which will constitute a breach of the United Nations Charter. Membership of the U N O involves special rights and duties in connection with the U N machinery for the maintenance of international peace and security (Articles 24 25 and 43). Thus the member nations are legally bound to accept and carry out the decisions of the Security Council. The non existence of such a system was considered the main weakness of the League. Under the Covenant the Council was empowered to make decisions but the carrying out of them was the individual responsibility of the members. If they wanted to take action they could do so but if they had no inclination to abide by a decision there was nothing in the Covenant which could compel them to carry it out.

Since no individual member can on its own initiative take any action in reference to the maintenance of world peace and security naturally enough the Security Council has been armed with ample military powers. Not only it can pool together the armed resources of the member nations but it can also direct their operation and disposal under its command. For this purpose the Charter provides for the Military Staff Committee an auxiliary body of the Security Council whose function is to advise and assist the Security Council on all questions relating to Security Council's military requirements.

These provisions of the Charter contemplate to make the Security Council guardian in chief of world peace and security. In the event of a world crisis or tension the member nations are under the command of the Security Council. Does this mean that the Security Council is a super national organ which can dictate to the member nations? The answer can be superficially in the affirmative. But the correct appraisal of these provisions would be in saying that since the U N is a voluntary organization of the nations since the member nations have delegated certain authority to it to act in certain ways under certain circum-

stances and since they have assumed responsibility to abide by its decisions and to carry out its instructions the Security Council is a sort of agent which is empowered to bind its principal by its actions the authority so delegated is irrevocable for the duration of the Organization

With this picture of the Security Council as the guardian in chief of international peace and security a layman is bound to wonder at the failures of the United Nations and particularly of the Security Council. The sceptic politician in international relations has waxed eloquent at the failures of the U N according to him the U N has been a make belief the Charter a dead heap of articles and the security system merely a flop which was meant to dupe the peoples of the world by falsely assuring them perennial peace. The U N in the present form has not met all our expectations thus spoke Mr. Dulles before the American Bar Association on 23rd August 1953

The one and the foremost reason given for the failure of the security system of the U N is the veto provision of the U N Charter

PROCEDURE IN THE SECURITY COUNCIL

A resolution to be carried in the Security Council must receive seven affirmative votes including the votes of the permanent members. Any resolution can be defeated by a negative vote of a single permanent member. Though it has been established that if a permanent member absents himself it would not mean a negative vote. The matters before the Security Council may be of the following two types

- (a) substantive and
- (b) procedural

On the matters which are procedural the veto is not applicable. But whether a matter is procedural or substantive is governed by the veto. The Charter starts with the fundamental assumption that the big five will act together and in case they fail to do no decision can be imposed on the dissident permanent member. It can happen that even procedural matters can be put under the veto if a permanent member so desires. If pressed to division he can exercise his negative vote and can thus assert that the matter in his opinion is one of substance.

When a dispute or an alleged dispute is under discussion in the Security Council the principles of natural justice apply. Hearing of the dispute is a quasi judicial act just as ministerial enquiry under English Law. The two basic principles of natural justice incorporated in the Charter are

- (i) No one shall be condemned unheard and
- (ii) A party to a dispute shall not be a judge of its own case¹

It may be noted that these two principles are not subject to veto

No one shall be condemned unheard —It has been specifically laid down in the Charter that when the interest of a member of the U N is under consideration of the Security Council and that member is not a member of the Security Council it will be invited by the Security Council and will be given full opportunity to represent its case. This rule was firmly laid down as early as

10th July 1946 when the Soviet representative wanted to apply veto on question of invitation to Canada to participate in the Council's discussion on atomic energy. It was considered as a procedural matter under Article 31. Out of this provision two things could be laid down. A member of the U.N. whose interest is affected by a discussion in the Security Council can claim to be heard and the non member nations can be heard only if they are parties to the dispute under discussion of the Security Council. Thus both the parties to the dispute can claim to be heard by the Security Council and it is the duty of the Security Council to provide full opportunity for doing so. But if a party offered this opportunity does not avail of it it cannot prevent or affect the Security Council from taking a decision on the matter.

A Party to a Dispute Shall Not be a Judge in its Own Case —It has been provided in the Charter that a party to the dispute cannot exercise its vote. In those cases where the Security Council is attempting to settle a dispute pacifically by negotiations enquiry mediation conciliation arbitration or judicial settlement a member cannot exercise the vote. Even in those cases in which the Security Council ultimately decides to take executive action the preliminary hearing and discussion is free from vote. Of course if the Security Council decides to take executive action such a decision is subject to veto. The position may be discussed in reference to cases where the Security Council decides to instruct parties to settle their dispute pacifically and cases where it decides to take enforcement actions.

The main concern of the Security Council is in reference to those disputes which are likely to disturb the peace. If a permanent member is involved in such a dispute it seems to be very difficult that the Security Council will be able to make a declaration as such a declaration will require the concurrence of the very power in danger of being labelled a political peace breaker. This has happened. In the First Persian Case M. Vysinsky decided that there was no dispute or situation likely to affect the world peace the same was held by Mr. Bevin in the Greek case by Van Kleffers in the Indonesian case by M. Bidaut in the Syro-Lebanese case.

However once the existence of such a dispute or situation is found by the Security Council under Article 34 then the parties to the dispute cannot exercise their vote and when a direction is given to settle the issue by pacific means for example directions under Articles 33 (2) 36 37 (2) or 38 it cannot be vetoed.

But then despite the fact that parties to the dispute cannot vote when a direction for the pacific settlement of a dispute or situation has been given yet there is nothing except the fear of public opinion to prevent a permanent member not party to the dispute from exercising the veto.

Enforcement Action —The question of enforcement action arises when the Security Council has decided that a situation or a dispute exists necessitating enforcement action. The taking of an enforcement action is not a judicial or quasi judicial act but a pure and simple executive action. Under this there may come two classes of cases firstly the recommendation to the General Assembly for the suspension of a member (under Article 5) or recommendation for the expulsion of a member under Article 6. In both these cases the representatives of the suspended or expelled state cannot participate in the deliberations of the

Security Council So far no case has arisen. However, it is conceived that if the Security Council decides that such members may be provided with an opportunity to present their case there is nothing in the Charter to prevent it from doing so.

Secondly when the Security Council decides to take enforcement action under Chapter VII of the Charter which relates to actions in respect to Threats to Peace Breaches of Peace and Acts of Aggression or under Chapter VIII relating to Regional Arrangements under Article 39 the Security Council has been empowered to take immediate action against a wrong doer and to restore peace and security.

Kelson has opined that if the decision of the Security Council is made under Article 39 the ordinary member of the Security Council as well as the permanent members would be permitted to vote. A state of inequality would then exist between the ordinary members and the temporary members invited for pacific settlement under Article 32 thus a perplexing situation is presented in the case of a dispute between a permanent or non permanent member of the Security Council and a temporary member invited to participate under Article 32 without a vote in the discussion relating to a dispute under consideration by the Security Council. Kelson has been rightly replied by Dr. Wortley who sees no real difficulty here. Onus of keeping the peace is upon the Members of the Security Council and it is right that they should decide upon the executive action they have to initiate.

The Drafting Committee at San Francisco has expressed itself thus. In the case of a flagrant aggression imperilling the existence of a member of the organization enforcement measures should be taken without delay and to the full extent required by the circumstances except that the Council should endeavour to persuade the aggressor to abandon its venture.

From the provisions of the Charter it is crystal clear that only in case of actual violence or violation of peace or an action of aggression the Security Council is empowered to take enforcement action. The enforcement action may be—(1) measures not involving use of armed forces and (2) measures involving the use of armed forces.

In both the above cases the unanimous vote of the five permanent members and the concurrence of the two other members of the Security Council is necessary, if that is not possible an enforcement action cannot be taken. It means that in the case of enforcement action the veto is applicable. The negative vote of one single permanent member can thwart the whole scheme of enforcement action of the Council.

VETO THE BALANCER OF POWER

We have seen above that on certain matters a negative vote of a permanent member would operate as a veto. Since the Security Council is vested with such vast plenary powers as the use of armed forces for the maintenance of international peace and security it was very natural that some such provision was incorporated in the Charter. The British Commentary of the U N Charter has explained the provision by arguing that at the end of a long exhaustive way no one of the powers was willing to sign a blank cheque and all insisted that they should not be

committed to sanction or to interlocutory decisions potentially leading to sanctions, except by their express consent in each individual case

Admittedly a negative vote of a permanent member of the Security Council can thwart the entire security scheme of the U N. But, then, there was no other and better alternative. If enforcement action is deemed necessary against a big power and even if the Security Council is successful in taking a decision of applying enforcement measures against it the total war will become inevitable and unavoidable. This is the reality of the whole situation. This has been realized by the framers of the Charter. The U N Charter is based on the fundamental assumption that the big powers will be able to co-operate. The sponsoring powers at San Francisco in an answer to a query on veto expressed their belief that the permanent members would not use the veto power to obstruct the operation of the Security Council.

Ever since the inception of the U N the Western Powers have been accusing the Soviet Union of using the veto with a view to deliberately obstruct the operation of the Security Council. Since then the Western powers have been making efforts to modify if not delete the effect of the veto.

As early as 10th December 1946 the General Assembly passed a resolution requesting the permanent members of the Security Council to use the veto sparingly and to make every effort to ensure that the use of special voting privilege should not impede the Security Council in reaching decisions promptly. Pursuant to the same policy in March 1948 the Interim Committee of the General Assembly recommended a list out of which it suggested 36 matters should be regarded as procedural and 21 should be taken by the vote of any seven members. It may be noted that the procedural matters are not subject to veto. The Committee further recommended that the permanent members should try to consult each other in advance on all important matters and should use veto only on very vital issues. Further in 1949 the General Assembly adopted another resolution asking members to forego their right of using veto where seven affirmative votes have already been cast. Finally by uniting for peace resolution of General Assembly passed in 1950 an attempt has been made to further reduce the effect of veto. The Interim Committee and the uniting for peace resolution deserve some detailed analysis.

The Interim Committee or to call it by its popular name Little Assembly was proposed by the U S A with the motive of finding a way out to limit the effect of the veto in the Security Council. It has been construed as a sort of high power committee of the General Assembly. By applying its steam rolling majority in the General Assembly the U S A intends to achieve that which it has failed to in the Security Council. The Soviet Union and her allies have obviously refused to participate in this Little Assembly. As the Little Assembly has been empowered to conduct investigation and appoint commissions of enquiry it has been observed by the Soviet Union's representative that it is incompatible with the U N Charter. Article 22. These tasks have been specifically assigned to the Security Council under Chapter VI of the Charter.

Almost the same is true of the uniting for peace resolution. The operative part of the resolution provides that if the Security Council because of lack of unanimity or permanent members failing to exercise their primary responsibility for maintenance of international peace and security in any case where there appears

to be threat to peace breach of peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures including in case of breach of peace or act of aggression the use of armed forces when necessary to maintain or to restore international peace and security

The resolution further provides for the establishment of 'Peace Observation Commission and Collective Measures Committee

The entire resolution is obviously inconsistent with the Charter. The General Assembly cannot assume such vast powers. These powers clearly belong to the Security Council. Under Articles 10 and 11 the General Assembly can merely discuss and recommend matters relating to international peace and security. The power to determine and take action in respect to a threat to peace breach of peace and act of aggression has been expressly given to the Security Council under Article 39 of the Charter. The giving of this power to the General Assembly is not only the usurpation of the power of the Security Council but also *ultra vires* of the Charter. No doubt the General Assembly has been empowered to determine a situation but then under Article 11 (2) such a determination must be referred to the Security Council. In no case the General Assembly has any power of making recommendation to the Security Council for taking enforcement actions. Nor has the General Assembly any power of using armed forces.

In our humble submission such attempt of circumventing the provision of the Charter cannot be considered conducive to the healthy working of the U N or to the development of International Law. It is needless to add that all these resolutions were initiated by the Western Powers and it was due to their majority in the General Assembly that they were carried. It should also be obvious that all these resolutions could be passed due to the gerrymandering of the Western Bloc in the U N. The veto was enshrined in the Charter precisely to check the gerrymandering of the majority Bloc.

Fortunately, the General Assembly does not possess such wide and big powers as are possessed by the Security Council. Had there been no veto rule the majority bloc in the Security Council would have tried to impose its will on the minority, which would have in due course led to the disruption of the U N. Thus the existence of the veto operates as a balancer of power.

And this is so despite the fact that not all vetoes in the Security Council have been used by the Soviet Union. The Western Bloc too has used it from time to time. And sometimes the veto has been misused.

On the one hand attempts have been made to whittle down the effect of the veto by various resolutions of the General Assembly. On the other hand some spokesmen of the Western Powers have gone very far in condemning the veto provision so much so that some have asserted that the veto the autocratic stamp over the law of the U N has seriously damaged the ideal of democracy cherished by the U N and have prophesied that this would soon lead to the dismemberment of the U N. Others have opined that the veto has in fact made the security scheme of the U N entirely ineffective.

It may be admitted that the veto can lead to mischievous results. But not on all occasions the veto has been used for mischievous purposes, rather, on many

occasions, it has been used rightly. That this is so has been amply demonstrated by the 60th and the 61st vetoes in the Security Council. Had there been no veto power, the interested parties in the U N would have been able to create confusion in two of the most important issues before the Security Council.

Statesmen like Dulles, disgusted with this state of affairs, have given a call for threefold revision of the Charter. One of them is the veto rule. The abolition of the veto rule has been given much prominence. However, if this will be done, it would mean the establishment of the rule of majority. This is not going to help the matters much. The veto provision of the Charter was amply discussed at San Francisco. The alternatives to the veto were either the rule of unanimity of the entire members of the Security Council or the rule of majority. Both were considered as unworkable. The diplomats assembled at San Francisco thought of effecting a *via media* between the two. They established the rule of unanimity of the permanent members of the Security Council and they also provided that if seven members of the Security Council, including the concurring vote of the five permanent members, pass a resolution it will be deemed carried. Hegemony of the big powers is a fact in international relations to-day; the same fact has been recognized in the Charter.

The fact of the matter is that in our present day world of turmoil and enmity, the fundamental assumption of the U N Charter has been forgotten. In 1944, Cordell Hull very pertinently remarked:

'Without an enduring understanding between the super human powers of their fundamental purposes, interests and obligations to one another, all organization to preserve peace are creations on papers and the path is wide open again for the rise of new aggression.

And Stalin observed on 6th November, 1945: 'The action of the U N will be effective if the great powers which have borne the brunt of war against the Hitlerite Germany continue to act in a spirit of unanimity and accord. This will not be effective if this essential condition is violated.

If the aggressive in Guatemala can remind the world politicians this fundamental assumption of the U N, there is still hope that this generation and the coming generation will be saved from the scourge of another world holocaust.

detail inasmuch as it affected a series of cases and the properties involved would be considerable as alleged by Mr. Seervai before the trial Court. We are not concerned with the policy of the appellants in making test cases of this character. The only thing that impresses us in this case is that the unfortunate first respondent has had to bear the brunt of the battle and has been worsted in this preliminary point which was found in her favour both by the trial Court and the Court of Appeal. We cannot make any order for costs in her favour. But we think that the justice of the case requires that the appellants as well as the first respondent will bear and pay their own respective costs both here and in the Court of Appeal.

We therefore allow the appeal, set aside the decree passed by the Court of Appeal and remand the Appeal No. 117 of 1952 for hearing and final disposal by the Court of Appeal on the other points which have been raised in the matter after hearing both the parties. There will be no order as to costs here as well as in the Court of Appeal.

Agent for Appellant R H Dhebar

Agent for Respondent No. 1 R A Gagra

Appeal allowed.

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction]

PRESENT —MEHRCHAND MAHAJAN *Chief Justice*, B K MUKHERJEA, S R DAS, VIVIAN BOSE AND GRULAM HASAN, JJ

Saghir Ahmad and another

*Appellants**

v

The State of U P and others

Respondents

Uttar Pradesh Road Transport Act (II of 1951)—Provision for nationalisation of motor bus transport—Constitutional validity—Provisions of infringement of fundamental rights under Article 19 (1) (g) and void under Article 13 of the Constitution of India—Exception under clause (6) of Article 19 (before its amendment)—Applicability and burden of proof—Article 31 (2)—Applicability—Article 14 if offended—Articles 301 and 304—Scope and effect

The right of the public to use motor vehicles on the public road cannot in any sense be regarded as a right created by the Motor Vehicles Act. The right exists anterior to any legislation on this subject as an incident of public rights over a highway. The State only controls it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on a public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies vehicles for pleasure or pastime or for the purpose of trade or business. The nature of the right in respect of the highway is not in any way affected thereby and it cannot be said that the user of a public road for purposes of trade is an extraordinary or special use of the highway which can be acquired only under special sanction from the State. The doctrine of 'franchise' recognised in America has no place in our Constitution. Under the Indian Constitution the contract carriers as well as the common carriers would occupy the same position so far as the guaranteed right under Article 19 (1) (g) of the Constitution of India is concerned and both are liable to be controlled by appropriate regulation under clause (6) of that Article.

All public streets and roads vest in the State but the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally, but subject

to such limitations the right of a citizen to carry on business in transport vehicles on public paths ways cannot be denied to him on the ground that the State owns the highway

G S S Motor Service v State of Madras, (1952) 2 M L J 804, approved

Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19 (1) (g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that Article.

The U. P. Road Transport Act (II of 1951) has excluded all private bus owners from the field of transport business. *Prima facie* it is an infraction of the provision of Article 19 (1) (g) of the Constitution unless it can be justified under the provisions of clause (6) of Article 19.

In order to judge whether State monopoly is reasonable or not, regard must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must always be held valid irrespective of the particular conditions and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public, they must be reasonable as well and the reasonableness could be decided only on a conspectus of all the relevant facts and circumstances.

When the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article. If those who support the legislation do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6) it is surely not for the citizens affected to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community.

If the impugned Statute had been passed after the amendment of the Constitution the State would not have to justify its action as reasonable. But the amendment of the Constitution, which came later, cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed. Accordingly the impugned Act which violates the fundamental rights of the citizen under Article 19 (1) (g) of the Constitution and is not shown to be protected by clause (6) of the Article as it stood at the time of the enactment, must be held to be void under Article 13 (2) of the Constitution.

Clauses (1) and (2) of Article 31 of the Constitution are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. In these circumstances the impugned legislation does conflict with the provisions of Article 31 (2) of the Constitution and as the requirements of that clause have not been complied with it should be held to be invalid on that ground. The impugned Statute does not offend Article 14 of the Constitution.

Quære Whether the impugned Act conflicts with the guarantee of freedom of inter State and intra State trade, commerce and intercourse provided for by Article 301 of the Constitution?

Although the Constitution was amended in 1951 by insertion of an additional clause in Article 19 (6) by which State monopoly in regard to trade or business was taken out of the purview of Article 19 (1) (g) of the Constitution, yet no such addition was made in Article 301 or Article 304 of the Constitution and Article 301, as it stands, guarantees freedom of trade, commerce and intercourse subject only to Part XIII of the Constitution and not the other parts of the Constitution including that dealing with Fundamental rights. It is certainly an arguable point as to whether the rights of individuals alone are dealt with in Article 19 (1) (g) of the Constitution leaving the freedom of trade and commerce, meaning by that expression 'only the free passage of persons and goods within or without a State to be dealt with under Article 301 and the following Articles.

Appeals under Article 132 (1) of the Constitution of India from the judgment and order dated the 17th November, 1953, of the High Court of Judicature at Allahabad in Civil Misc Writ No. 414 of 1953, connected with Civil Misc Writs

Nos 537, 579 to 582, 587 to 593, 597 to 603, 617 to 620, 622, 623, 626 to 629, 633, 634, 638, 639, 651 to 654, 677 all of 1952 and 339 to 342, 351 to 355, 363, 372 to 374, 397, 416 to 464, 504 and 505 of 1953

G S Pathak, Senior Advocate (*V D Bhargava* and *Naunil Lal*, Advocates, with him) for Appellants

A L Mitra, Advocate General for the State of U P and *Jagdish Suarup*, Senior Advocate (*J K Srivastava* and *G P Lal*, Advocates, with them) for Respondents

The Judgment of the Court was delivered by

Mukherjea, J—The appellants in these two analogous appeals along with many others, have been carrying on the business of plying motor vehicles, as 'stage carriages' on hire, on the Bulandshahr Delhi route from a number of years past. The running of these vehicles has been regulated so long by the Motor Vehicles Act of 1939 which provides, *inter alia* for granting of driving licences, the registration of vehicles and exercising control over transport vehicles through permits granted by Regional Transport Authorities. Section 42 (3) of the Act exempts transport vehicles, owned by or on behalf of the Central Government or the Provincial Government from the necessity of obtaining permits unless the vehicles were used in connection with the business of an Indian State Railway. It appears, that some time after 1947 the Government of U P conceived the idea of running their own buses on the public thoroughfares. They first started running buses only as competitors with the private operators but later on they decided to exclude all private bus owners from the field and establish a complete State monopoly in respect to the road transport business. They sought to achieve this object by calling in aid the provisions of the Motor Vehicles Act itself. Under section 42 (3) of the Act as mentioned above the Government had not to obtain permits for their own vehicles and they could run any number of buses as they liked without the necessity of taking out permits for them. The Transport Authorities in furtherance of this State policy began cancelling the permits already issued to private operators and refusing permits to people who would otherwise have been entitled to them. Upon this, a number of private bus owners filed petitions in the Allahabad High Court under Article 226 of the Constitution praying for appropriate relief by way of writs, against what was described as the illegal use of the provisions of the Motor Vehicles Act by the Government of U P. These petitions were heard by a Full Bench of five Judges and four judgments were delivered dealing with various questions that were raised by the parties. A majority of the judges expressed the opinion that the State purporting to act under section 42 (3) of the Motor Vehicles Act, could not discriminate against other persons in their own favour and that the subsection in so far as it purports to exempt State Transport buses from the obligation to obtain permits for their use, conflicts with Article 14 of the Constitution. All the judges concurred in holding that nationalisation of an industry was not possible by a mere executive order without appropriate legislation and such legislation would probably have to be justified under Article 19 (6) of the Constitution. As a result of this decision the Transport Authorities were directed to deal with the applications for permits, made by the various private bus owners, in accordance with the provisions of the Motor Vehicles Act, without in any way being influenced by the consideration that the State Government wanted to run buses of their own on certain routes.

In view of this pronouncement of law, the State Government which wanted to have the exclusive right to operate Road Transport Services within its territory, sought the assistance of the Legislature and the U P Road Transport Act (Act II of 1951), was passed and became law on and from the 10th of February, 1951. It is the constitutional validity of this enactment which is the subject matter of contest in these present proceedings.

The Preamble to the Road Transport Act (hereinafter called "The Act") says

Whereas it is expedient in the interest of the general public and for the promotion of the suitable and efficient road transport to provide for a State Road Transport Services in Uttar Pradesh, it is enacted as follows

Section 2 gives definitions of certain terms, while section 3, which is the most material section in the Act embodies virtually its whole purpose. It provides that where the State Government is satisfied that it is necessary, in the interest of general public and for subverting the common good, so to direct it may declare that the Road Transport Services in general or any particular class of such service on any route or portion thereof shall be run and operated by the State Government exclusively or by the State Government in conjunction with railway or partly by the State Government and partly by others in accordance with the provisions of this Act. Section 4 provides for publication of a scheme framed in accordance with the above declaration and objections to such scheme can be made by interested persons in the manner laid down in section 5. As soon as the scheme is finalised, certain consequences follow which are detailed in section 7. So long as the scheme continues in force the State Government shall have the exclusive right to operate Road Transport Services or if the scheme so provides, a certain fixed number of transport vehicles belonging to others can also be run on those roads. The State Government shall be authorised in all such cases to direct the dispensation of the State Transport vehicles from the necessity of taking out permits, or to cancel, alter or modify an existing permits or to add any fresh condition to any permit in respect of any transport vehicles. The remaining portion of the Act purports to lay down how the provisions of the Act are to be worked out and implemented. Sections 8 and 9 provide respectively for the appointment of a Transport Commission and Advisory Committees. Under section 10 the State Government may delegate its powers under the Act to an officer or authority subordinate to it. Section 12 makes it an offence for any person to drive a public service vehicle or allow such vehicle to be used in contravention of the provisions of section 7. It is not necessary to refer to the provisions of the remaining sections as they are not material for our present purpose.

By a notification dated the 25th of March 1953 the U P Government published a declaration in terms of section 3 of the Act, to the effect, that the State carriage services, among others, on the Bulandshahr Delhi route, shall be run and operated exclusively by the State Government. A further notification issued on the 7th of April following, set out what purported to be a scheme for the operation of the State carriage services on these routes. Thereupon the two appellants as well as several other private bus owners numbering 106 in all who plied transport buses on these routes, presented petitions under Article 226 of the Constitution before the High Court at Allahabad praying for writs, in the nature of *mandamus*, directing the U P Government and the State Transport Authorities not to inter-

fere with the operation of the stage carriages of the petitioners and to refrain from operating the State Road Transport Service except in accordance with the provisions of the Motor Vehicles Act. The constitutional validity of the Act was challenged on a number of grounds, the principal contentions being

(1) that the Act was discriminatory in its character and contravened the provisions of Article 14 of the Constitution,

(2) that it conflicted with the fundamental rights of the petitioners guaranteed under Article 19 (1) (g) of the Constitution, and

(3) that it was an invalid piece of legislation as it purported to acquire the interest of the petitioners in a commercial undertaking without making any provision for compensation as is required under Article 31 (2) of the Constitution. It was further argued that the Act violated the guarantee of freedom of inter State and intra-State trade embodied in Article 301 of the Constitution.

All these writ petitions were heard by a Division Bench of the High Court consisting of Mukherji and Chaturvedi, JJ. By two separate but concurring judgments, dated the 17th of November, 1953, the learned Judges repelled all the contentions of the petitioners and dismissed the writ petitions. It is against this decision that these two appeals have come up to this Court on the strength of certificates granted by the High Court and Mr. Gopal Swarup Pathak appearing in support of the appeals has reiterated practically all the grounds which were urged on behalf of his clients in the Court below. We will take up these points in proper order and it will be convenient first of all to address ourselves to the two allied questions, viz., whether the appellants could claim any fundamental right under Article 19 (1) (g) of the Constitution which can be said to have been violated by the impugned legislation, and whether the Act has deprived them of any 'property' which would attract the operation of Article 31 of the Constitution?

Mr. Pathak argues that a right to carry on any occupation, trade or business is guaranteed to all citizens by Article 19 (1) (g) of the Constitution. The appellants in the present cases were carrying on the business of plying buses on hire on a public highway up till now and the Act which prevents them from pursuing that trade or business conflicts therefore with the fundamental right guaranteed under Article 19 (1) (g) of the Constitution. It is said also that this beneficial interest of the appellants in the commercial undertaking is 'property' within the meaning of Article 31 (2) of the Constitution and as the Act does not conform to the requirements of that Article, it must be held to be void.

Mr. Pathak put forward another and a somewhat novel argument that the right of the appellants to use a public highway for purposes of trade is in the nature of an easement and as such can be reckoned as property in law, consequently there has been a deprivation of property by the impugned legislation in this sense also. This contention seems to us to be untenable and it was rightly abandoned by the learned counsel.

The Advocate General appearing for the State of U P did not and could not dispute that a right to pursue any trade, business or occupation of one's choice is guaranteed by the Constitution. He says however that this does not mean that a citizen can carry on his trade or business anywhere he likes and such right is also guaranteed by the Constitution. He must have a legal right to use a particular place for purposes of his trade or business, before he can resist any encroachment

upon it on the strength of the constitutional guarantee His argument in substance is, that the bus owners, as members of public, have no legal right to ply buses on hire on any public road The only right which a member of the public can assert in respect of a highway is the right of passing and repassing over it The State in which all public ways vest under the law, has the sole right to determine whether it would allow any citizen to carry on a trade or business upon a public highway and if so to what extent The citizen has no inherent right in this respect apart from any State sanction The position therefore is, that the rights of the appellants, as indeed those of the other bus owners, are created entirely by State legislation and by State legislation they could be deprived of the same There is no question of any conflict with the fundamental right guaranteed under Article 19 (1) (g) of the Constitution in such cases The argument requires careful consideration

It is not disputed that the Bulandshahr Delhi route is a part of the Grand Trunk Road which is a public highway According to English law, which has been applied all along in India a highway has its origin, apart from statute, in dedication, either express or implied by the owner of land of a right of passage over it to the public and the acceptance of that right by the public¹ In the large majority of cases this dedication is presumed from long and uninterrupted user of a way by the public, and the presumption in such cases is so strong as to dispense with all enquiry into the actual intention of the owner of the soil and it is not even material to enquire who the owner was² The fact that the members of the public have a right of passing and repassing over a highway does not mean however that all highways could be legitimately used as foot passages only and that any other user is possible only with the permission or sufferance of the State It is from the nature of the user that the extent of the right of passage has to be inferred and the settled principle is that the right extends to all forms of traffic which have been usual and accustomed and also to all which are reasonably similar and incidental thereto³ The law has thus been stated in Halsbury's Laws of England⁴

Where a highway originates in an inferred dedication it is a question of fact what kind of traffic it was so dedicated for having regard to the character of the way and the nature of the user prior to the date at which they infer dedication, and a right of passage once acquired will extend to more modern forms of traffic reasonably similar to those for which the highway was originally dedicated, so long as they do not impose a substantially greater burden on the owner of the soil"

There can be no dispute that the Grand Trunk Road which, as a public highway, has been in existence since the 15th Century A.D. has been used for all sorts of vehicular traffic that were in vogue at different times Motor vehicles were certainly not known when the road came into existence but the use of motor vehicles in modern times as means of locomotion and transport could not, on the principle stated above amount to an unwarrantable extension of the accustomed user to which the highway is subjected If there is any danger to the road by reason of such user, or if such user by one interferes with the user by others, it is up to the State to regulate the motor traffic or reduce the number or weight of vehicles on the road in any way it likes, and to that no objection can possibly be taken But the right of the public to use motor vehicles on the public road cannot, in any sense, be regarded as a right created by the Motor Vehicles Act The right exists

1 *Ibid* Pratt & Mackenzie on 'Law of Highways' 19th Edn, page 13

3 *Ibid*, page 35

2 *Ibid*, page 28

4 *Ibid* Vol 16, page 185

anterior to any legislation on this subject as an incident of public rights over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business. The nature of the right in respect to the highway is not in any way affected thereby and we cannot agree with the learned Advocate General that the user of a public road for purposes of trade is an extraordinary or special use of the highway which can be acquired only under special sanction from the State.

The learned Advocate General in support of his contention has referred us to a few American cases on the point. In the case of *Paclard v. Banton*¹, Sutherland, J., observed as follows:

'The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for purposes of gain is special and extraordinary and generally at least may be prohibited or conditioned as the Legislature deems proper.'

This decision was approved in *Frost v. Railroad Commission*² and again in *Stephenson v. Bindford*³, where Sutherland, J., practically reiterated his observations in the previous case as follows:

'It is a well established law that the highways of the State are public property, that their primary and preferred use is for private purposes, and that their use for purposes of gain is special and extraordinary which generally at least the Legislature may prohibit or condition as it sees fit.'

We do not think that this is the law of India under our Constitution. The cases referred to above were noticed by the Allahabad High Court in the Full Bench decision of *Mohlal v. Uttar Pradesh Government*⁴ and two of the learned Judges constituting the Full Bench expressed their opinion that this 'doctrine of exceptional user' might have been evolved by the American Courts in the same way as they evolved the 'doctrine of police powers'. They both held that this American rule did not embody the English or the Indian law on the subject.

This identical point was investigated with considerable thoroughness in a recent decision of the Madras High Court⁵ and it was pointed out by Venkatarama Ayyar, J., who delivered the judgment of the Court, that the rule of special or extraordinary use of highways in America had its roots in the doctrine of 'franchise', which is still a recognised institution in that country. The doctrine of 'franchise' or 'privilege' has its origin in English Common Law and was bound up with the old prerogative of the Crown. This doctrine continued to live in the American legal world as a survival of the pre-independence days though in an altered form. The place of the royal grants under the English Common Law was taken by the legislative grants in America and the grant of special rights by legislation to particular individuals or companies is regarded there as a 'franchise' or 'privilege' differing from the ordinary liberties of a citizen. The carrying on of transport buses by common carriers on the public road in America is a 'franchise' and not a common law right, which could be claimed by all citizens and a distinction is made, as the cases cited above will show, between contract carriers who carry passengers or goods under particular contracts and common carriers whose business is affected

1 Vide 68 L.E. 396, 76 U.S. 140

2 Vide 70 L.E. 1101 at 1103

3 Vide 77 L.E. 283 at 294

4 Vide I.L.R. (1951) All 237

5 Vide C.S.S. Motor Serv. ce v. State of Madras, (1952) 2 M.L.J. 894

with public interest. Over the latter the State claims and exercises a plenary power of control. Ayyar, J., has, in our opinion, rightly pointed out that this doctrine of 'franchise' has no place in our Constitution. Under the Indian Constitution the contract carriers as well as the common carriers would occupy the same position so far as the guaranteed right under Article 19 (1) (g) is concerned and both are liable to be controlled by appropriate regulations under clause (6) of that Article. The law on the point, as it stands at present, has been thus summed up by the learned Judge:

The true position, then is that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally, but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.

We are in entire agreement with the statement of law made in these passages. Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19 (1) (g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that Article.

The legislation in the present case has excluded all private bus owners from the field of transport business. *Prima facie* it is an infraction of the provision of Article 19 (1) (g) of the Constitution and the question for our consideration therefore is, whether this invasion by the Legislature of the fundamental right can be justified under the provision of clause (6) of Article 19 on the ground that it imposes reasonable restrictions on the exercise of the right in the interests of the general public.

Article 19 (6) of the Constitution, as it stands after the amendment of 1951, makes a three fold provision by way of exception to or limitation upon clause (1) (g) of the Article. In the first place it empowers the State to impose reasonable restrictions upon the freedom of trade, business, occupation or profession in the interests of the general public. In the second place it empowers the State to prescribe the professional and technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. Thirdly,—and this is the result of the Constitution (First) Amendment Act of 1951—it enables the State to carry on any trade or business either by itself or through a corporation owned or controlled by the State to the exclusion of private citizens wholly or in part. It is not disputed that the third provision which was introduced by the amendment of the Constitution in 1951, was not in existence when the impugned Act was passed and the High Court rightly held that the validity of the Act is not to be decided by applying the provision of the new clause. The learned Judges held however that quite apart from the new provision, the creation of a State monopoly in regard to transport service, as has been done under the Act, could be justified as reasonable restrictions upon the fundamental right enunciated in Article 19 (1) (g) of the Constitution imposed in the interests of the general public. The question is, whether the view taken by the High Court is right?

To answer this question three things will have to be considered. The first is whether the expression 'restriction' as used in Article 19 (6) and for the matter of that in the other sub clauses of the Article means and includes total deprivation as well? If the answer is in the affirmative then only the other two questions would arise, namely, whether these restrictions are reasonable and have been imposed in the interests of the general public? According to the meaning given in the Oxford Dictionary, the word 'restriction' connotes a limitation imposed upon a person or a thing a condition or regulation of this nature though the use of the word in the sense of suppression is not altogether unknown. In the case of *Municipal Corporation of the City of Toronto v Ugo*¹ Lord Davey while discussing a statutory power conferred on a Municipal Council to make bye laws for regulating and governing a trade made the following observation:

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think that there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

This line of reasoning receives support from the observations made by some of the learned Judges of this Court in their respective judgments in the case of *A. K. Gopalan v The State*². The question for consideration in that case was the constitutional validity of the Preventive Detention Act and one of the contentions raised by the learned counsel for the appellant in attacking the validity of the legislation was that it invaded the right of free movement guaranteed under Article 19 (1) (d) of the Constitution and as the restrictions imposed by it could not be regarded as reasonable restrictions within the meaning of clause (5) of the Article the enactment should be held to be void. This argument was repelled by the majority of the Judges *inter alia* on the ground that a law which authorises the deprivation of personal liberty did not fall within the purview of Article 19 and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of Articles 21 and 22 of the Constitution. The expression 'personal liberty' as used in Article 21 it was said was sufficiently comprehensive to include the particular freedoms enumerated in Article 19 (1) and its deprivation therefore in accordance with the provision of Article 21 would result in automatic extinction of the other freedoms also. In this connection reference was made to the several sub clauses of Article 19 and Patanjali Sastri, J., expressed his view in the following words:

The use of the word 'restrictions' in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article are still capable of being exercised and to exclude the idea of incarceration though the words 'restriction' and 'deprivation' are sometimes used as interchangeable terms as restriction may reach a point where it may well amount to deprivation. Read as a whole and viewed in its setting among the group of provisions relating to Right to Freedom Article 19 seems to my mind to pre-suppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests.

The point for consideration in that case was undoubtedly different from the one that has arisen in the present case and the question whether the restrictions

¹ L.R. (1896) A.C. 88, 93.

1950 S.C.J. 174 (S.C.).

² (1950) 2 M.L.J. 42, 1950 S.C.R. 88.

enumerated in the several sub-clauses of Article 19 could go to the length of total deprivation of these liberties was neither raised nor decided in that case. But a distinction was drawn by the majority of learned Judges between negation or deprivation of a right and a restriction upon it and although it was said that restriction may reach a point where it might amount to deprivation, yet restrictions would normally pre-suppose the continued existence—no matter even in a very thin and attenuated form—of the thing upon which the restrictions were imposed. *Karua*, C.J., in his judgment *vide* page 106) expressly said

Therefore Article 19 (3) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21.

Against this view it may be urged that the use of the words "deprivation" and 'restrictions' as interchangeable expressions is not altogether unusual in ordinary language and the nature and extent of restrictions might in some cases amount to a negation of the right. The Orissa High Court in the case of *Lokanath Murra v. The State of Orissa*¹, accepted this view and made a distinction between 'regulation' and "restriction". In the opinion of the learned Judges, the observations of Lord Davey in *Municipal Corporation of the City of Toronto v. "Virgo"*, referred to above could be distinguished on the ground that the expression used in that Article was not 'restriction' but regulation and 'governing'. It is said that the framers of the Constitution were aware of the distinction between the power to 'regulate' and the power to 'restrict' and this would be apparent from a scrutiny of sub-clause (a) of clause 2) of Article 25 of the Constitution where the words regulating and "restricting" occur in juxtaposition indicating thereby that they were not intended to convey the same meaning.

On behalf of the respondents much reliance has also been placed on a decision of this Court in *Coojerjee v. The Excise Commissioner, etc.*², where the point for consideration was the validity of the Excise Regulation (I of 1915). It was contended *inter alia*, on behalf of the appellant in that case that the Excise Regulation and the auction sales made thereunder were *ultra vires*, as the law purported to grant monopoly of that trade to a few persons and this was inconsistent with Article 19 (1) (g) of the Constitution. This contention was negatived and this Court held that for the purpose of determining reasonable restrictions within the meaning of Article 19 (6) of the Constitution on the right given under Article 19 (1) (g), regard must be had to the nature of the business and the conditions prevailing in a particular trade. The State has certainly the right to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. The relevant portion of the judgment runs as follows

Article 19 (1) (g) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business, and clause (6) of the Article authorises legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation.

1 A.I.R. 1952 Orissa 42

2 L.R. (1896) A.C. 83.

It is contended on behalf of the respondents that these observations clearly indicate that the expression "reasonable restriction" as used in Article 19 (6) of the Constitution might, in certain circumstances, include total prohibition. It may be mentioned here that the Excise Regulation is not a prohibitory statute which prohibits trading in liquor by private citizens altogether. It purports to regulate the trade in a particular way, namely, by putting up the right of trading in liquor in specified areas to the highest bidder in auction sale. The general observations occurring in the judgment cited above must therefore have to be taken with reference to the facts of that case.

Be that as it may, although in our opinion the normal use of the word "restriction" seems to be in the sense of 'limitation' and not 'extinction', we would on this occasion prefer not to express any final opinion on this matter. If the word 'restriction' does not include total prohibition then the law under review cannot be justified under Article 19 (6). In that case the law would be void unless it can be supported by Article 31. That point will be dealt with under the other point raised in the appeal. If however the word "restriction" in Article 19 (6) of the Constitution be taken in certain circumstances to include prohibition as well, the point for consideration then would be, whether the prohibition of the right of all private citizens to carry on the business of motor transport on public roads within the State of Uttar Pradesh as laid down by the Act can be justified as reasonable restrictions imposed in the interests of the general public.

As has been held by this Court in the case of *Cooverjee v The Excise Commissioner, etc.*¹, whether the restrictions are reasonable or not would depend to a large extent on the nature of the trade and the conditions prevalent in it. There is nothing wrong in the nature of the trade before us, which is perfectly innocuous. The learned Judges of the High Court have upheld the validity of the legislation substantially on two grounds. In the first place, they have relied on what may be said to be an abstract proposition of law, that prohibition with a view to State monopoly is not *per se* unreasonable. "In my opinion" thus observes one of the learned Judges, "even this total stoppage of trade on public places and thoroughfares cannot *always* be said to be an unreasonable restriction". In the second place, it has been said that the transport services are essential to the life of the community and it is conducive to the interests of the general public to have an efficient system of transport on public roads. It is pointed out that the preamble to the Act indicates that the legislation was passed in the interests of the general public who are undoubtedly interested in a suitable and efficient road transport service, and it was not proved by the petitioners that the monopoly, which was contemplated in favour of the State in regard to this particular business, was not conducive to the common welfare. As a proposition of law, the first ground may not admit of any dispute but we think that the observations of Lord Porter in the Privy Council case of *Commonwealth of Australia and others v Bank of New South Wales and others*² upon which considerable reliance has been placed by the High Court would indicate the proper way of approach to this question. "Their Lordships do not intend to lay it down" thus observed Lord Porter,

that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged

¹ (1954) S.C.R. 873 1954 S.C.J. 2,6.

² L.R. (1950) A.C. 235 at 311

on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation."

In order to judge whether State monopoly is reasonable or not, regard therefore must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people a legislation which makes provision for such service must always be held valid irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular conditions and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public they must be reasonable as well and the reasonableness must be decided only on a conspectus of all the relevant facts and circumstances.

With regard to the second point also we do not think that the learned Judges have approached the question from the proper standpoint. There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community. In the present case we have absolutely no materials before us to say in which way the establishment of State monopoly in regard to road transport service in the particular areas would be conducive to the general welfare of the public. We do not know the conditions of the bus service at the present moment or the conveniences or inconveniences of the public in regard to the same, nor we are told how the position is likely to improve if the State takes over the road transport service and what additional amenities or advantages the general public would enjoy in that event. We mention these matters only to show that these are relevant facts which might help the Court in coming to a decision as to the reasonableness or otherwise of the prohibition but unfortunately there are no materials in the record relating to any one of them. One thing however, in our opinion, has a decided bearing on the question of reasonableness and that is the immediate effect which the legislation is likely to produce. Hundreds of citizens are earning their livelihood by carrying on this business on various routes within the State of Uttar Pradesh. Although they carry on the business only with the aid of permits which are granted to them by the authorities under the Motor Vehicles Act, no compensation has been allowed to them under the statute. It goes without saying that as a result of the Act they will all be deprived of the means of supporting themselves and their families and they will be left with their buses which will be of no further use to them and which they may not be able to dispose of easily or at a reasonable price. It may be pointed out in this connection that in Part IV of the Constitution which enunciates the directive principles of State policy Article 39 (a) expressly lays down that the State shall direct its policy towards securing "that the citizens men and women equally, have the right to an adequate means of livelihood." The new clause in Article 19 (6) has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business,

but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19 (1) (g) of the Constitution. It is quite true that if the present statute was passed after the coming into force of the new clause in Article 19 (6) of the Constitution the question of reasonableness would not have arisen at all and the appellants' case on this point at any rate, would have been unarguable. These are however considerations which cannot affect our decision in the present case. The amendment of the Constitution, which came later, cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed. As Professor Cooley has stated in his work on Constitutional Limitations¹

' a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re enacted

We think that this is sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under Article 19 (1) (g) of the Constitution and is not shown to be protected by clause (6) of the Article, as it stood at the time of the enactment, must be held to be void under Article 13 (2) of the Constitution.

We now come to the second point which is in a manner connected with the first and the question is—If the effect of prohibition of the trade or business of the appellants by the impugned legislation amounts to deprivation of their property or interest in a commercial undertaking within the meaning of Article 31 (2) of the Constitution, does not the legislation offend against the provision of that clause inasmuch as no provision for compensation has been made in the Act? It is not seriously disputed on behalf of the respondents that the appellants' right to ply motor vehicles for gain is in any event, an interest in a commercial undertaking. There is no doubt also that the appellants have been deprived of this interest. In the opinion of the High Court, in the circumstances of the present case, there is no scope for operation of Article 31 (2) of the Constitution and the reason for taking this view is thus given in the judgment of one of the learned Judges

The question is whether by depriving the private operators of their right to run buses on certain routes and by deciding to run the routes itself the State acquired the right which was of the petitioners? To me it appears that it could not be said that there was by the State any acquisition of the right which was formerly of the petitioners whether such right was property or an interest in a commercial or industrial undertaking. The vehicles which were being operated by the private operators have not been acquired by the State nor has any other tangible property which was used by the petitioners for their business been acquired. What has been done is that the petitioners have been prohibited from operating their buses on certain routes. This right of the petitioners has in no way been vested in the State inasmuch as the State always had an equal right with the petitioners to run their buses on these routes.

According to the High Court therefore, mere deprivation of the petitioners' right to run buses or their interest in a commercial undertaking is not sufficient to attract the operation of Article 31 (2) of the Constitution as the deprivation has been by the authority of law within the meaning of clause (1) of that Article. Clause (2) could be attracted only if the State had acquired or taken possession of this very right or interest of the petitioners or in other words if the right of the petitioners

to run buses had been acquired by or had become vested in the Government. The State, it is pointed out, has an undoubted right to run buses of its own on the public thoroughfares, and they do not stand on the rights of the petitioners. This argument, we think, is not tenable having regard to the majority decision of this Court in the case of *State of West Bengal v. Subodh Gopal Bose & others*¹ and *Dwarkanadas Shrinagar v. The Sholapur Spinning and Weaving Co., Ltd.*² In view of that majority decision it must be taken to be settled now that clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers: the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). The learned Advocate General conceded this to be the true legal position after the pronouncements of this Court referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think therefore that in these circumstances the legislation does conflict with the provision of Article 31 (a) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground.

ously the State cannot but be differentiated from ordinary citizens and placed in a separate category so far as the running of the business is concerned and this classification would have a perfectly rational relation to the object of the statute. No doubt if the creation of a monopoly in favour of the State is itself bad on the ground of violating some constitutional provisions the statute would be invalid for those reasons and the question of discrimination would not be material at all. In our opinion the argument of Mr Pathak that the State ceases to function as a State as soon as it engages itself in a trade like ordinary trader cannot be accepted as a sound proposition of law under the Constitution of India at the present day. In the last century when the *laissez faire* doctrine held the field the primary function of a State was considered to be maintenance of law and order and all other activities were left to private competitors. That conception is now changed and in place of the 'police State' of old we are now having a 'welfare State'. Chapter IV of our Constitution which lays down the Directive Principles of State Policy clearly indicates what the functions of a State should be and many things which could not have been considered as State functions when the case of *P and O Steam Navigation Company's case*¹ was decided would certainly come within the legitimate scope of State duties².

The other contention of Mr Pathak in regard to Article 14 though somewhat plausible at first sight does not appear to us to be sound. Section 3 of the Act authorises the State Government to declare that the road transport service in general or on particular routes should be run and operated by the State Government exclusively or by the State Government in conjunction with railway or partly by the State Government and partly by others in accordance with the provisions of the Act. The whole question is how is the last part of the section to be implemented and carried out? If the State can choose any and every person it likes for the purpose of being associated with the transport service and there are no rules to guide its discretion plainly the provision would offend against Article 14 of the Constitution. The learned Advocate General pointed out however that the State is only to choose the routes or portions of routes on which the private citizens would be allowed to operate and the number of persons to whom permits should be given and that the granting of permits would necessarily be regulated by the provisions of Motor Vehicles Act. This does not appear to us to be an unreasonable construction to be put upon the relevant portion of section 3 of the Act and it receives support from what is laid down in section 7 (c) of the Act. On this construction the discretion to be exercised by the State would be a regulated discretion guided by statutory rules. We hold therefore that the appellant cannot make any grievance on this score and that the statute does not offend against Article 14 of the Constitution.

The last point that remains to be considered is whether the Act conflicts with the guarantee of freedom of inter State and intra State trade, commerce and intercourse provided for by Article 301 of the Constitution? Article 301 runs as follows:

Subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free.

Article 302 authorises the Parliament to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any

¹ (1861) 5 B.H.C.R. Append x.

² *State of Orissa A.I.R. 1952 Orissa 42* at page 47.

³ *Idem* in this connection *Lokanath Misra v*

part of the territory of India as may be required in the public interests. Under Article 304 (b) it is competent even for the Legislature of a State to impose reasonable restrictions upon the freedom of trade, commerce and intercourse mentioned above in the interests of the public but it is necessary that any bill or amendment for this purpose should first receive the sanction of the President before it is moved or introduced in the Legislature of a State. Article 301 corresponds to section 92 of the Australian Constitution and is even wider than the latter inasmuch as the Australian Constitution provides for the freedom of inter State trade only. The High Court has negatived the contention of the appellants on this point primarily on the ground that Article 301 of the Constitution has no application to the present case. What is said is, that Article 301 provides safeguards for carrying on trade as a whole as distinguished from the rights of an individual to carry it on. In other words this Article is concerned with the passage of commodities or persons either within or outside the State frontiers but not directly with individuals carrying on the commerce or trade. The right of individuals, it is said, is dealt with under Article 19 (1) (g) of the Constitution and the two Articles have been framed in order to secure two different objects.

The question is not quite free from difficulty and in view of the fact that we have declared the Act to be unconstitutional on the two grounds mentioned above we do not consider it necessary to record our decision on this point. We would only desire to indicate the contentions that have been or could be raised upon this point and the different views that are possible to be taken in respect to them so that the Legislature might take these matters into consideration if and when they think of legislating on this subject.

We desire to point out that in regard to section 92 of the Australian Constitution which so far as inter State trade is concerned adopts almost the same language as Article 301 of our Constitution it has been definitely held by the Judicial Committee in the case of *Commonwealth of Australia v The Bank of New South Wales*¹, that the rights of individuals do come within the purview of the section. It is true as Lord Porter observed, that section 92 does not create any new juristic rights but it does give the citizens of the State or the Commonwealth, as the case may be the right to ignore and, if necessary, to call on the judicial power to help him to resist legislative or executive actions which offend against the section. It follows from this, as His Lordship pointed out, that the application of section 92 does not involve calculations as to the actual present or possible future effect upon the total value of inter-State trade, the difficulty in applying such a criterion being too obvious. If this view is adopted in regard to Article 301 of our Constitution it can plausibly be argued that the legislation in the present case is invalid as contravening the terms of the Article. The question of reasonable restrictions could not also arise in this case, as the Bill was not introduced with the previous sanction of the President as required by the proviso to section 304 (b). It is true that the consent of the President was taken subsequently but the proviso expressly insists on the sanction being taken previous to the introduction of the Bill.

It may be argued that freedom of trade does not, as Lord Porter observed in the *Australian Bank case*² referred to above, mean unrestricted or unrestrained freedom and that regulation of trade is quite compatible with its freedom. As

¹ L.R. (1950) A.C. 235

against this it may be pointed out that the Constitution itself has provided in Articles 302 and 304 (b) how reasonable restrictions could be imposed upon freedom of trade and commerce and it would not be proper to hold that restrictions can be imposed *alunde* these provisions in the Constitution. The question would also arise as to what interpretation should be put upon the expression "reasonable restrictions" and whether or not we would have to apply the same tests as we have applied in regard to Article 19 (6) of the Constitution. One material thing to consider in this connection would be that although the Constitution was amended in 1951 by insertion of an additional clause in Article 19 (6) by which State monopoly in regard to trade or business was taken out of the purview of Article 19 (1) (g) of the Constitution, yet no such addition was made in Article 301 or Article 304 of the Constitution and Article 301, as it stands, guarantees freedom of trade commerce and intercourse subject only to Part XIII of the Constitution and not the other parts of the Constitution including that dealing with fundamental rights.

The Australian Constitution indeed has no provision like Article 19 (1) (g) of the Indian Constitution and it is certainly an arguable point as to whether the rights of individuals alone are dealt with in Article 19 (1) (g) of the Constitution leaving the freedom of trade and commerce, meaning by that expression 'only the free passage of persons and goods' within or without a State to be dealt with under Article 301 and the following Articles.

We have thus indicated only the points that could be raised and the possible views that could be taken but as we have said already, we do not desire to express any final opinion on these points as it is unnecessary for purposes of the present case. The result is that in our opinion the appeals should be allowed and the judgment of the High Court set aside. A writ in the nature of *mandamus* shall issue against the respondents in these appeals restraining them from enforcing the provisions of the Uttar Pradesh State Road Transport Act 1950, against the appellants or the men working under them. There will be no order as to costs.

Appeals allowed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B K. MUKHERJEA, S R. DAS,
VIVIAN BOSE AND GHULAM HASAN, JJ

Jumuna Prasad Mukhariya and others

*Appellants**

Lachhi Ram and others

Respondents

Representation of the People Act (XLIII of 1951) sections 123 (5) and 124 (5)—Constitutional validity—If interfere with fundamental right to freedom of speech under Article 19 (1) (a) of the Constitution of India (1950)—Section 100 (2) (b) of Act (XLIII of 1951)—Effect

Sections 123 (5) and 124 (5) of the Representation of the People Act (1951) cannot be said to interfere with a citizen's fundamental right to freedom of speech. These laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter Parliament. The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. Citizens have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules the impugned sections do not stop them. Sections 123 (5) and 124 (5) of the Representation of the People Act, 1951, are *intra vires*.

The result of committing any corrupt practice is that the election of the candidate is void under section 100 (2) (b) of the Act. It is not necessary to prove that the result of the election was materially affected thereby because clause (b) is an alternative that stands by itself. All that need be proved is that a corrupt practice has been committed.

On appeal by Special Leave granted by this Court on the 1st day of March, 1954, against the Judgment and Order, dated the 24th December, 1953, of the Election Tribunal, Gwalior, Madhya Bharat, in Election Petition No. 263 of 1952.

N C Chatterjee, Senior Advocate (*S K Kapur* and *Ganpat Rai*, Advocates, with him) for Appellants

C K Daphtary, Solicitor General for India (*S P Varma*, Advocate, with him) for Respondents Nos. 1 and 5

C K Daphtary, Solicitor General for India (*C P Lal*, Advocate, with him) for Respondent No. 4

The Judgment of the Court was delivered by

Bose, J.—This is an appeal from a decision of the Election Tribunal of Gwalior in which the petitioner, an elector, sought to set aside the elections of the appellants (respondents 1 and 2 to the petition) who were the successful candidates. The constituency is Bhilsa, a double member constituency in Madhya Bharat. The petitioner seems to have been fighting on behalf of the 6th and 7th respondents to the petition because one of his prayers is that they be declared to have been duly elected in place of the appellants (respondents 1 and 2). The petitioner succeeded and the Tribunal declared the elections of the two appellants to be void and further declared that the 6th and 7th respondents had been duly elected.

We will first consider that part of the decision which declares the election of the two appellants to be void.

The Tribunal finds among other things, that the appellant No. 1 (1st respondent) published certain pamphlets which contain statements listed as (a), (b), (c), (d), (e), (f) and (g) by the Tribunal. The Tribunal holds that these statements are false and that the 1st appellant (1st respondent) did not believe them to be true. It also holds that these statements reflect on the personal character and conduct of the 6th respondent and are reasonably calculated to prejudice his prospects in the election. These findings were contested and the learned counsel for the appellants contended that the attack was on the public and political character of the 6th respondent and was a legitimate attack. We do not intend to examine this as a Court of appeal because this is a special appeal and all we are concerned to see is whether a tribunal of reasonable and unbiased men could judicially reach such a conclusion. We have had some of these pamphlets read out to us and we are of opinion that the conclusion of the Tribunal is one which judicial minds could reasonably reach. We decline to examine the matter further in special appeal. Under the law the decision of the Tribunal is meant to be final. That does not take away our jurisdiction but we will only interfere when there is some glaring error which has resulted in a substantial miscarriage of justice. On those findings a major corrupt practice on the part of the 1st respondent (1st appellant here) under section 123 (5) of the Representation of the People Act, 1951, is established.

The next finding concerns the 2nd respondent (appellant No. 2). The Tribunal finds that he made a systematic appeal to Chamar voters to vote for him on the basis of his caste. There is evidence to support this finding. The leaflets marked

N and O place that beyond doubt This constitutes a minor corrupt practice under section 124 (5) of the Act

Both these provisions, namely, sections 123 (5) and 124 (5) were challenged as *ultra vires* Article 19 (1) (a) of the Constitution It was contended that Article 245 (1) prohibits the making of laws which violate the Constitution and that the impugned sections interfere with a citizen's fundamental right to freedom of speech There is nothing in this contention These laws do not stop a man from speaking They merely prescribe conditions which must be observed if he wants to enter Parliament The right to stand as a candidate and contest an election is not a common law right It is a special right created by the statute and can only be exercised on the conditions laid down by the statute The Fundamental Rights Chapter has no bearing on a right like this created by statute The appellants have no fundamental right to be elected members of Parliament If they want that they must observe the rules If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them We hold that these sections are *intra vires*

In addition to these findings, the Tribunal found that both the appellants committed an illegal practice within the meaning of section 125 (3) in that they issued a leaflet and a poster which did not have the name of the printer on them This is a pure question of fact

The result of committing any corrupt practice is that the election of the candidate is void under section 100 (2) (b) It is not necessary to prove that the result of the election was materially affected thereby because clause (b) is an alternative that stands by itself All that need be proved is that a corrupt practice has been committed, and that the Tribunal finds to be the fact The Tribunal was accordingly justified in declaring the election of the first appellant to be void

In addition to this the Tribunal found that the corrupt practice committed by the second appellant (respondent No 2) also materially affected the result of the election This was challenged but we need not go into that because the finding that the second appellant committed a minor corrupt practice and also an illegal practice is clear and so his case falls under clause (a) of sub-section (2) of section 100

Sub-section (2) (a) so far as it is material here, runs

if the Tribunal is of opinion—

(a) that the election of a returned candidate has been procured or induced or the result of the election has been materially affected, by any corrupt or illegal practice

The Tribunal shall declare the election of the returned candidate to be void

The Tribunal finds as a fact that the second appellant's election was procured by a corrupt practice His case therefore falls within the first of the three alternatives envisaged by clause (a), so it is not necessary to enquire whether it also falls under the third We hold that this election was also rightly declared to be void That disposes of the first and second appellants (respondents 1 and 2)

We now turn to respondents 6 and 7 to the petition They are the 4th and 5th respondents before us, Ram Sahai and Sunnu Lal The Tribunal, acting under section 101 (b), declared them to be duly elected Here, we are of opinion that the Tribunal was wrong Before this can be done, it must be proved that

but for the votes obtained by the returned candidate by corrupt or illegal practices such other candidate would have obtained a majority of the valid votes "

The Constituency was a double-member constituency. The following stood for the General Constituency and obtained the votes shown against them.

Jumuna Prasad Mukharia (Respondent No 1)	13,669
Keshav Shastri (Respondent No 3)	1,999
V N Sheode (Respondent No 4)	1,350
Ram Sahai (Respondent No 6)	12,750

The Tribunal says that the difference in votes between respondents 1 and 6 is 919. We presume that this is meant to show that the voting between them was close. From that the Tribunal jumps to the following conclusion

‘Considering the scandaous nature of the false statement regarding respondent No 6 and the mode of systematic appeal on the basis of caste made by respondent No 2 we have no doubt in our minds that respondent No 1 got more votes simply because of corrupt practices and if these corrupt practices had not been there respondent No 6 undoubtedly would have obtained a majority of valid votes

This, in our opinion, is pure speculation and is not a conclusion which any reasonable mind could judicially reach on the data set out above. There is nothing to show why the majority of the 1st respondent's voters would have preferred the 6th respondent and ignored the 3rd and 4th respondents

An exactly similar process of reasoning was followed in the case of the 7th respondent. He was a scheduled caste candidate and the voting there was as follows:

Chaturbhuj Jatav (Respondent No 2)	12,452
Hira Khusla Chamar (Respondent No 5)	601
Surmulal (Respondent No 7)	10,889

Here, again, there is no basis for concluding that those who voted for the 2nd respondent would, if they had not done so, have preferred the 7th respondent to the 5th

We set aside this part of the order

The result is that the appeal fails in so far as it attacks the Tribunal's declaration voiding the election of the two appellants but succeeds against that part of the order which declares the 6th and 7th respondents to have been elected. In the circumstances there will be no order about costs in either Court

Appeal allowed in part

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, Chief Justice, B. K. MUKHERJEA, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

Rananjaya Singh

.. Appellant*

Baynath Singh and others

.. Respondents.

Representation of the People Act (XLIII of 1951), section 123 (7)—Officers and servants of candidate's father (who was the proprietor of an estate) and paid by the father working for candidate in addition to other workers—If contravenes section 77 and amounts to corrupt practice

In order to amount to a corrupt practice the excess expenditure must be incurred or authorised by a candidate or his agent and the employment of extra persons must likewise be by a candidate or his agent.

Where the charge against *R* the candidate (the son of the proprietor of the Amethi estate) in the instant case was, *inter alia* that the Manager, Assistant Manager 20 Ziladars of Amethi estate and their peons and orderlies had worked for *R*, in connection with the election the Tribunal took the view that although the estate belonged to the father of *R* nevertheless as *R* was the heir apparent and actually looked after the estate on behalf of the old and infirm proprietor these servants of the estate were virtually his 'own' servants and could properly be regarded as having been employed for payment by *R* and declared the election of *R* to be void. On appeal,

Held there can be no doubt in the eye of the law these extra persons were in the employment of the father of *R* and paid by the father and they were neither employed nor paid by *R*. The case, therefore, does not fall within section 123 (7) at all and if that be so it cannot come within section 124 (4) of the Representation of the People Act, 1951. It obviously was a case where a father assisted the son in the matter of the election. *Quia R* these persons were neither employed nor paid by him. So far as *R* was concerned they were mere volunteers and employment of volunteers does not bring the candidate within the mischief of the definition of corrupt practice as given in section 123 (7).

Quære Whether if one's own servants are also utilised or employed in the conduct of the election their salary for the period they are so utilised or employed should be regarded as election expenses and shown in the return?

On appeal by Special Leave granted by this Court on the 4th March, 1954, against the Judgment and Order, dated the 11th day of February, 1954, of the Election Tribunal, Allahabad in Election Petition No. 252 of 1952.

N C Chatterjee and *G N Kunzru*, Senior Advocates (*Rameshwar Nath* and *Rajinder Narain*, Advocates, with them) for Appellant.

Veda Vyasa, Senior Advocate (*G C Mathur*, Advocate, with him) for Respondent No. 1.

The Judgment of the Court was delivered by

Das, J.—Kunwar Rananjaya Singh, the appellant before us, is the son of Raja Bhagwan Bux Singh of Amethi. He was the successful candidate at an election to the Uttar Pradesh Legislative Assembly from Amethi (Central) constituency the polling in respect of which took place on the 31st January, 1952, and the result whereof was announced on the 6th February, 1952, and finally published in the Uttar Pradesh State Gazette on the 26th February, 1952. The respondent Baijnath Singh who was one of the unsuccessful candidates filed an election petition calling in question the election of the appellant. Three other unsuccessful candidates were also impleaded as respondents. The grounds on which the election was challenged were that the appellant himself, together with his own and his father's servants and other dependents and agents, committed various corrupt practices of bribery, exercise of undue influence, publication of false and defamatory statements and concealment of election expenses as per particulars set forth in the petition and the schedules thereto. He prayed that the election of the appellant be set aside and that he, the said respondent, be declared to have been duly elected. The appellant alone contested the petition. In his written statement he denied each and every one of the charges of corrupt practices levelled against him and he also filed a petition of recrimination challenging the conduct of the said respondent at the election. The said respondent denied the charges imputed to him. Altogether 15 issues were raised, namely, eight on the election petition and 7 on the petition of recrimination. All the 7 issues arising out of the petition of recrimination were found by the Tribunal constituted for hearing of the election petition against the appellant and the petition of recrimination was dismissed. The appellant has not contested the correctness of those findings before us and nothing further need be said about them. As regards the issues arising on the main election petition the Election Tribunal found

in favour of the appellant on issues Nos 1, 2, 4, 5, 6 and 7 but decided issue No 3 against the appellant. That issue was as follows —

3. Did respondent No 1 employ for election more persons than authorised by law?

Did respondent No 1 incur the expenditure shown in the list as Heads of other concealed expenditures? Did he exceed the prescribed limit of expenditure for election?

The above issue related to charges made out in paragraph 6 of the election petition and the list of particulars set out in Part III of the schedule thereto. The particulars in that part were grouped under two main heads, each containing several items. The first head referred to persons alleged to have been employed on payment far in excess of the prescribed number and not shown in the return of election expenses. The second head of particulars contained other alleged concealed expenditures. The Election Tribunal held in favour of the appellant on all items of charges under both heads in Part III except items (ii) and (iii) of the first head. Item (ii) charged that all the paid Ziladars of Amethi estate who were about 20 in number assisted by their peons and orderlies worked for the appellant and item No (iii) complained that the Manager and the Assistant Manager of that estate also worked for him. The Tribunal held that the number of all these persons coming within these two categories far exceeded the prescribed number of persons who could be employed in an election and their salary for the period they worked for the appellant in connection with the election, if added to the admitted election expenses would exceed the maximum expenditure permissible for contesting a single-member constituency. The Tribunal, therefore, held that the appellant was guilty, under both these heads, of corrupt practice as defined in section 123 (7) of the Representation of the People Act, 1951 and was consequently liable to be dealt with under section 100 (2) (b) and section 145 of that Act. These findings as to employment of extra persons on payment and the expenditure of money in excess of the permissible maximum election expenses necessarily led to the further finding that inasmuch as these expenses had not been shown in the appellant's return of election expenses the appellant was also guilty of a minor corrupt practice as defined in section 124 (4) of the Act and was liable to be dealt with under section 100 (2) (a) and section 145 of the Act. In the result, the Tribunal under the general issue No 8 only declared the election of the appellant to be void. Hence this appeal filed by the unseated candidate with the special leave of this Court.

Section 77 of the Representation of the People Act, 1951, provides that the maximum scales of election expenses at elections and the numbers and descriptions of persons who may be employed for payment in connection with election shall be as may be prescribed. As regards the maximum expense Rule 117 lays down that no expense shall be incurred or authorised by a candidate or his election agent on account of or in respect of the conduct and management of an election in any one constituency in a State in excess of the maximum amount specified in respect of that constituency in Schedule V. The maximum amount specified in that schedule in respect of a single-member constituency in the Uttar Pradesh is only Rs 8,000. Rule 118 prescribes that no person other than or in addition to those specified in Schedule VI shall be employed for payment by a candidate or his election agent in connection with an election. Schedule VI allows 1 election agent, 1 counting agent, 1 clerk and 1 messenger at all elections. It also allows, in addition to these, 1 clerk and 1 messenger for every 75 000 electors and 1 polling agent and 2 relief agents for each polling booth and 1 messenger at each polling

booth. The contravention of the provisions of section 77 read with Rules 117 and 118 and Schedules V and VI is made a corrupt practice by section 123 (7). Section 123 (7) clearly shows that in order to amount to a corrupt practice the excess expenditure must be incurred or authorised by a candidate or his agent and the employment of extra persons must likewise be by a candidate or his agent.

The charge against the appellant was, *inter alia*, that the Manager, Assistant Manager, 20 Ziladars of Amethi estate and their peons and orderlies had worked for the appellant in connection with the election. The Tribunal took the view—we think quite erroneously—that although the estate belonged to the father of the appellant, nevertheless, as the appellant was the heir apparent and actually looked after the estate on behalf of the old and infirm proprietor these servants of the estate were “virtually” his own servants and could properly be regarded as having been employed for payment by the appellant. The learned Advocate appearing for the respondent frankly and properly conceded that he could not support this part of the finding of the Tribunal. He however contended relying on the language used in section 77 that if the number of persons who worked for payment in connection with the election exceeded the maximum number specified in Schedule VI, the case fell within the mischief of the relevant sections and the rules, no matter who employed them or who made payments to them. It is true that section 77 uses the words ‘who may be employed for payment’ without indicating by whom employed or paid but it must be borne in mind that the gist of a corrupt practice as defined in section 123 (7) is that the employment of extra persons and the incurring or authorising of excess expenditure must be by the candidate or his agent. The provisions of Rules 117 and 118 are to be read in the light of this definition of a corrupt practice. Indeed, these rules follow the language of section 123 (7) in that they prohibit the employment of persons other than or in addition to those specified in Schedule VI and the incurring or authorising of expenditure in excess of the amount specified in Schedule V and in both cases by a candidate or his agent. Section 77 must therefore be read in a manner consonant with section 123 (7) and Rules 117 and 118. In this view of the matter the observation made by Phillimore, J. in *Joseph Forster Wilson and another v. Sir Christopher Furness*¹, relied on by the appellant and referred to in the judgment of the Tribunal are quite apposite. There can be no doubt that in the eye of the law these extra persons were in the employment of the father of the appellant and paid by the father and they were neither employed nor paid by the appellant. The case, therefore, does not fall within section 123 (7) at all and it has to be said, it cannot come within section 123 (4). It obviously was a case where a father assisted the son in the matter of the election. These persons were the employees of the father and paid by him for working in the estate. At the request of the father they assisted the son in connection with the election which strictly speaking they were not obliged to do. Was the position in law at all different from the position that the father had given these employees a holiday on full pay and they voluntarily rendered assistance to the appellant in connection with his election? We think not. It is clear to us that *qua* the appellant these persons were neither employed nor paid by him. So far as the appellant was concerned they were mere volunteers and the learned Advocate for the respondent admits that employment of volunteers does not bring the candidate within the mischief of the definition of

corrupt practice as given in section 123 (7). The learned Advocate, however, contended that such a construction would be against the spirit of the election law in that candidates who have rich friends or relations would have an unfair advantage over a poor rival. The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the sections of the Act and the rules made thereunder. If all that can be said of these statutory provisions is that construed, according to the ordinary, grammatical and natural meaning of their language they work injustice by placing the poorer candidates at a disadvantage the appeal must be to Parliament and not to this Court.

On a consideration of the relevant provisions of the Act and the rules and the arguments advanced before us we are of opinion that the appellant cannot in the circumstances of this case be held to be guilty of any corrupt practice under section 123 (7) as alleged against him. It follows from this that not having incurred any expenditure over and above what was shown by him in his return of election expenses he cannot be said to have concealed such expenditure and, therefore, he cannot be held to have been guilty of any minor corrupt practice under section 124 (4) of the Act. In the view we have taken, namely, that these extra men were not employed or paid by the appellant, it is unnecessary, for the purpose of this appeal, to discuss the question whether if one's own servants are also utilised or employed in the conduct of the election, their salary for the period they are so utilised or employed should be regarded as election expenses and shown in the return. On that we prefer not to express any opinion on this occasion. No other point having been raised we allow the appeal with costs.

Appeal allowed

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B. K. MUKHERJEA, S. R. DAS VIVIAN BOSE AND GHULAM HASAN, JJ

R. M. Seshadri

*Appellant**

The District Magistrate Tanjore and another
Union of India

*Respondents
Intervener*

Constitution of India (1950) Article 19 (1) (g) and (6)—Right to carry on trade or business'—If controlled by condition in licence issued under the Cinematograph Act (II of 1918) section B requiring exhibition of one or more approved films as directed by the Government at each performance

The license issued by the District Magistrate to the owner of a cinema theatre contained *inter alia* the following condition as required by a Government notification under section 8 of the Cinematograph Act 4 (a) The licensee shall exhibit at each performance one or more approved films of such length and for such length of time as the Provincial Government or the Central Government may by general or special order direct.

(b) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance.

Explanation—"Approved films" means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.

Special condition 3—The licensee should exhibit at the commencement of each performance not less than 2 000 feet of one or more approved films

The licensee moved the High Court of Madras under Article 226 of the Constitution for an order to the District Magistrate to delete the conditions from his licence and to the State of Madras to rescind the notifications issued by it. His contention was that the conditions imposed by the said notifications are *ultra vires* and beyond the powers of the licensing authority and that they are void inasmuch as they contravened his freedom of speech and expression under Article 19 (1) (a) and his right to carry on trade or business under Article 19 (1) (g) of the Constitution. The High Court rejected both the contentions and held that the conditions imposed were reasonable and were in the interests of the general public. On appeal

Held as the condition 4 (a) stands there is no principle to guide the licensing authority and a condition such as the above may lead to the loss or total extinction of the business itself. A condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction. The condition does not profess, to lay down that the approved films must be of an educational or instructional character for the purpose of social or public welfare. It savours more of an imposition than a restriction. Condition 4 (a) as it stands at present amounts to an unreasonable restriction on the right of the licensee to carry on his business and must be declared void as against the fundamental right of the appellant under Article 19 (1) (g).

Special condition No. 3, imposes no maximum length of film which a licensee may be compelled to exhibit and therefore the discretion of the authority is unrestrained and unfettered and must lead to an unjustifiable interference with the right of the licensee to carry on his business. This condition is equally obnoxious and must be deleted.

(1951) 2 M.L.J. 517, *reversed*

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order dated 24th August, 1951, of the Madras High Court in Civil Miscellaneous Petition No. 5744 of 1951.¹

The Appellant in person. Appeal filed by *S Subramanian*, Advocate
C.K. Daphtary, Solicitor General for India (*R Ganapathy Iyer* and *P. G Gokhale*, Advocates with him) for Respondent.

C K Daphtary, Solicitor-General for India (*P A Mehta* and *P G Gokhale*, Advocates, with him) for Intervener

The Judgment of the Court was delivered by

Ghulam Hasan J—The appellant is the owner of a permanent cinema theatre called Sri Brahannayaki in Tiruthuraiyandi, Tanjore District, and held a licence from the District Magistrate, Tanjore, in respect of the same with effect from 5th September, 1950, to 4th September, 1951. The licence is granted for one year at a time and is renewable from year to year. He objected to certain conditions in the licence imposed by the District Magistrate, Tanjore, in pursuance of 2 notifications (G O Mis 1054, Home dated 28th March 1948 and G O Mis 3422, dated 15th September, 1948) issued by the State of Madras purporting to act in exercise of powers conferred by section 8 of the Cinematograph Act of 1918. The impugned conditions may conveniently be set out here

4 (a) The licensee shall exhibit at each performance one or more approved films of such length and for such length of time as the Provincial Government or the Central Government may, by general or special order direct

(b) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance

Explanation—Approved films means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.

Special condition 3—The licensee should exhibit at the commencement of each performance not less than 2 000 feet of one or more approved films.

The appellant moved the High Court of Judicature at Madras under Article 226 of the Constitution for an order or direction to the District Magistrate, Tanjore, to delete the said conditions from his licence and to the State of Madras to rescind the notifications issued by it. His contention was that the conditions imposed by the said notifications are *ultra vires* and beyond the powers of the licensing authority and that they are void inasmuch as they contravened his freedom of speech and expression under Article 19 (1) (a) and his right to carry on trade or business under Article 19 (1) (g) of the Constitution. Both the contentions were rejected the High Court holding that the conditions imposed were reasonable and were in the interests of the general public. The High Court granted leave to appeal to this Court.

The appellant who argued the appeal in person raised 2 main contentions. He argued firstly, that the notifications and conditions are beyond the competence of the Government of Madras and the District Magistrate, and secondly, that in any event the conditions do not, as being outside the scope of the Cinematograph Act amount to reasonable restrictions imposed in the interest of the general public.

We are of opinion that this appeal can be disposed of on the second ground. It may be stated that the Madras Cinematograph Rules, 1933, were amended by the notification G O Mis 1054 Home, dated 28th March, 1948, in exercise of the powers conferred by section 8 of the Cinematograph Act, 1918 (Central Act II of 1918), and in place of condition 4 of the licence in Form A, the impugned conditions were inserted. Section 8 empowers the State Government to make rules for the purpose of carrying into effect the provisions of the Act. The object of the Act as stated in the preamble is to make provisions for regulating exhibitions under the Cinematograph Act. Without going into the question whether it is within the contemplation of the Act that educational and instructional films should be shown and whether the holder of a cinema licence may be compelled to exhibit such films as falling within the scope of the Act, the question which still arises for consideration is whether the impugned conditions amount to "reasonable restrictions" within the meaning of Article 19 (6). Approved films are those films which are either produced by the Government or are purchased from the private producers. As the private producers do not possess any machinery for marketing their films the Government purchases them from such producers and charges hire from the cinema licensees for showing such films. Condition 4 (a) compels a licensee to exhibit at each performance one or more approved films of such length and for such length of time as the Provincial Government or the Central Government may direct. Neither the length of the film nor the period of time for which it may be shown is specified in the condition and the Government is vested with an unregulated discretion to compel a licensee to exhibit a film of any length at its discretion which may consume the whole or the greater part of the time for which each performance is given. The exhibition of a film generally takes two hours and a quarter. Now, if there is nothing to guide the discretion of the Government it is open to it to require the licensee to show approved films of such great length as may exhaust the whole of the time or the major portion of it intended for each performance. The fact that the length of the time for which the approved

films may be shown is also unspecified leads to the same conclusion, in other words, the Government may compel a licensee to exhibit an approved film, say for an hour and a half or even two hours. As the condition stands, there can be no doubt that there is no principle to guide the licensing authority and a condition such as the above may lead to the loss or total extinction of the business itself. A condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction. It savours more of the nature of an imposition than a restriction. It is significant that the condition does not profess to lay down that the approved films must be of an educational or instructional character for the purpose of social or public welfare. We think, therefore, that condition 4 (a) as it stands at present amounts to an unreasonable restriction on the right of the licensee to carry on his business and must be declared void as against the fundamental right of the appellant under Article 19 (1) (g).

Among the special conditions condition No 3 which requires the licensee to exhibit at the commencement of each performance not less than 2,000 feet of one or more of the approved films is open to similar objection. This condition lays down the minimum length of the film to be shown as 2,000 feet and gives no indication of the maximum. We are informed that the showing of a film of 2,000 feet will take about 20 minutes. This will work out to about $\frac{1}{7}$ th of the total time of each performance if it is taken to last for $2\frac{1}{2}$ hours. Whether a maximum of 2,000 feet would be reasonable is a matter we need not consider but as this is mentioned as the minimum it is obvious that the Government may compel the licensee to exhibit a film of 10,000 or 12,000 feet which in effect will amount to pushing out of the film intended to be shown by the licensee during the time allotted. Here again no maximum limit having been imposed it follows that the discretion of the authority is unrestrained and unfettered and must lead to an unjustifiable interference with the right of the licensee to carry on his business. We hold, therefore, that this condition is equally obnoxious and must be deleted. We accordingly allow the appeal and hold that condition 4 (a) and special condition 3 expressed as they are at present are void and have no legal effect as against the fundamental right of the appellant under Article 19 (1) (g) of the Constitution.

We express no opinion upon the first contention advanced by the appellant. The appellant will get his costs from the respondent in this Court and in the Court below.

Appeal allowed

SUPREME COURT OF INDIA

(Original Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice*, B K MUKHERJEA,
S R DAS, VIVIAN BOSE AND GHULAM HASAN, JJ

Hira Lal Dixit

Petitioner*

v

The State of Uttar Pradesh

Respondent

In the matter of printing, publishing and circulation of a pamphlet over the name of the abovementioned Petitioner, Hira Lal Dixit (General Secretary), Praja Socialist Party, Mainpur) entitled "HAMARA VAHAN VIBHAG"

AND

In the matter of the Contempt of Court Proceedings

Contempt of Court—Party to a pending appeal distributing leaflets in the Court premises containing passage likely to hinder or obstruct the due course of administration of justice and making remarks about opposite party
Contempt—Court's power to punish for

A party to a pending appeal in the Supreme Court in which the State was the respondent distributed in the Court premises a printed leaflet which contained *inter alia* the following passage: "The public has full and firm faith in the Supreme Court, but sources that are in the know say that the Government acts with partiality in the matter of appointment of those Hon'ble Judges as Ambassadors, Governors, High Commissioners etc. who give judgments against the Government but this has so far not made any difference in the firmness and justice of the Hon'ble Judges."

Held the necessary implication of these words is that the Judges who decide in favour of the Government are rewarded by the Government with these appointments. The object of writing this passage and particularly of publishing it at the time it was actually done was quite clearly to affect the minds of the Judges and to deflect them from the strict performances of their duties. The offending passage and the time and place of its publication certainly tended to hinder or obstruct the due administration of justice and is a contempt of Court. Such insinuations as are implicit in the passage in question are derogatory to the dignity of the Court and are calculated to undermine the confidence of the people in the integrity of the Judges. The rest of the leaflet which contained an attack on a party to the proceedings the object of writing and the time and place of its publication being calculated to deflect the Court from performing its strict duty by creating prejudice in its mind against the State is equally a contempt.

The summary jurisdiction of Superior Courts must no doubt be sparingly exercised but where the public interest demands it the Court will not shrink from exercising it and imposing punishment even by way of imprisonment in cases where a fine may not be adequate.

Rule issued by the Court on 16th September, 1954, calling upon the respondents to appear and show cause why they should not be proceeded against for contempt of Court.

The Attorney-General for India (*M C Setalvad*) with *P A Mehta*, Advocate, present to assist the Court.

S C Isaacs, Senior Advocate (*R Patnank* and *S S Shukla of Shukla Prasad & Co*, Advocates with him) for Respondent No. 1.

Mohan Lal Saxena, Advocate and *S S Shukla of Shukla Prasad & Co*, Advocates with him for Respondent No. 2.

S S Shukla Advocate of *Shukla Prasad & Co* for Respondent No. 3.

The Judgment of the Court was delivered by
Das, J—This Rule was issued by this Court on the 16th September, 1954, calling upon the respondents to appear and show cause why they should not be proceeded against for contempt of this Court.

* In the matter of Petition No. 379 of 1953

It is desirable to mention at the outset the circumstances, in which it became necessary for this Court to issue this Rule. On the 14th September, 1954, there were on that day's cause list for hearing and final disposal two appeals, being Appeal No. 182 of 1954 (*Saghir Ahmad v. The State of Uttar Pradesh and others*) and Appeal No. 183 of 1954 (*Mirza Hasan Agha v. The State of Uttar Pradesh and others*)¹. A large number of writ petitions, 224 in number, under Article 32 of the Constitution raising the same questions were also on the cause list for that day. Both the appellants and all the petitioners were engaged in carrying on businesses as carriers of passengers and goods by motor buses or lorries on different routes under licenses issued by the State of Uttar Pradesh and in cases where the route passed into or through the State of Delhi countersigned by that State. Some of these persons had originally been granted permanent permits by the Regional Transport Authority. Pursuan to the policy of nationalisation of road transport business the State of Uttar Pradesh made declarations under section 3 of the Uttar Pradesh State Road Transport Act, 1950 to the effect that road transport services on certain routes should be run and operated by the State Government in the manner mentioned in the relevant declarations and it also published schemes of road transport services under section 4 of that Act. In furtherance of its object the State Government began to serve notices on the licensees to stop plying buses on specified routes. The appellants thereupon applied to the Allahabad High Court for a writ of *mandamus* directing the State Government and its Minister of Transport to withdraw the declaration made under section 3 of the Uttar Pradesh Road Transport Act, 1950 in respect of their respective routes and directing them and their officers to refrain from proceeding further under sections 4 and 5 of that Act and not to interfere with the operation of their respective stage carriages and for other ancillary reliefs. By an order made on the 17th November, 1953, the Allahabad High Court dismissed those applications. The two petitioners thereupon filed these two appeals in this Court after having obtained a certificate from the Allahabad High Court under Article 132 (1) of the Constitution. The appellants obtained orders for stay of proceedings until the determination of their appeals. In view of the decision of the Allahabad High Court many other persons holding licenses for plying motor stage carriages or contract carriages came direct to this Court with applications under Article 32 for appropriate writs and obtained interim stay. As already stated, the two appeals and all those numerous applications were posted on the cause list for the 14th September, 1954, for final disposal. The respondent Hira Lal Dixit was the petitioner in one of those writ applications. The two appeals were called on for hearing on that day and were part heard. The hearing continued for the whole of the 15th and 16th September, 1954, and was concluded on the 17th September, 1954, when the Court took time for considering its decision. The Court has not yet delivered its judgment. A large number of persons, presumably the petitioners in the writ petitions or otherwise interested therein, attended the Court on all those dates, for the result of the decision of the appeals would also conclude the writ petitions. It appears that on the 15th September, 1954, a leaflet printed in the Hindi language and characters, consisting of 18 pages, intitled "Hamara Vahan Vibhag" meaning "Our Transport Department," purporting to be written by the respondent Hira Lal Dixit and containing a foreword purporting to be written

1. The Judgment has been since reported in (1954) S.C.J. 819 (1954) 2 M.L.J. 622

tion of deciding cases in favour of Government in expectation of getting high appointments, nevertheless, if they decide in favour of the Government on this occasion knowledgeable people will know that they had succumbed to the temptation and had given judgment in favour of the Government in expectation of future reward in the shape of high appointments of the kind mentioned in the passage. The object of writing this paragraph and particularly of publishing it at the time it was actually done was quite clearly to affect the minds of the Judges and to deflect them from the strict performance of their duties. The offending passage and the time and place of its publication certainly tended to hinder or obstruct the due administration of justice and is a contempt of Court.

There is another aspect of the matter. Even if the passage about the Judges were not in the leaflet the rest would still amount to a serious contempt of Court. There is in it a strong denunciation of the State of Uttar Pradesh, a party to the appeal and the petitions regarding the very matters then under the consideration of this Court. It was not fair comment on the proceedings but an attempt to prejudice the Court against the State and to stir up public feeling on the very question then pending for decision. The manner in which the leaflets were distributed, the language used in them and the timing of their publication could only have had one object, namely to try and influence the Judges in favour of the petitioner and the others who were in the same position as himself. This again is a clear contempt of this Court.

It is well established as was said by this Court in *Brahma Prakash Sharma's case*¹ that it is not necessary that there should in fact be an actual interference with the course of administration of justice but that it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law. Such insinuations as are implicit in the passage in question are derogatory to the dignity of the Court and are calculated to undermine the confidence of the people in the integrity of the Judges. Whether the passage is read as fulsome flattery of the Judges of this Court or is read as containing the insinuations mentioned above or the rest of the leaflet which contains an attack on a party to the pending proceedings is taken separately it is equally contemptuous of the Court that the object of writing it and the time and place of its publication were or were calculated to deflect the Court from performing its strict duty, either by flattery or by a veiled threat or warning or by creating prejudice in its mind against the State. We are, therefore, clearly of opinion and we hold that the Respondent Hira Lal Dixit by writing the leaflet and in particular the passage in question and by publishing it at the time and place he did has committed a gross contempt of this Court and the qualified apology contained in his affidavit and repeated by him through his counsel cannot be taken as sufficient amends for his misconduct.

It should no doubt be constantly borne in mind that the summary jurisdiction exercised by superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Court and thereby affording protection to public interest in the purity of the administration of justice. This is certainly an extraordinary power which must be sparingly exercised but

¹ (1953) S.C.J. 521 (1953) S.C.R. 1169 (1953) 2 M.L.J. 231 (S.C.)

where the public interest demands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adequate

After anxious consideration we have come to the conclusion that in all the circumstances of this case it is a fit case where the power of the Court should be exercised and that it is necessary to impose the punishment of imprisonment. People must know that they cannot with impunity hinder or obstruct or attempt to hinder or obstruct the due course of administration of justice. We, therefore, find respondent Hira Lal Dixit guilty of contempt of Court make the Rule absolute as against him and direct that he be arrested and committed to civil prison to undergo simple imprisonment for a fortnight. He must also pay the costs, if any, incurred by the Union of India

Rule made absolute

SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —MEHR CHAND MAHAJAN, *Chief Justice* B K MUKHERJEA, VIVIAN BOSE, B JAGANNADHAS AND T L VENKATARAMA AYYAR, JJ

Zaverbhai Amaldas

*Appellant**

v

The State of Bombay

Respondent

Constitution of India (1950) Article 254 (2)—Scope and effect—Central Act (LII of 1950) amending Essential Supplies (Temporary Powers) Act XXIV of 1946) section 7—If proviso to section 2 of Bombay Act (XXXVI of 1947) providing for enhanced punishment—Doctrine of implied repeal

By the proviso to Article 254 (2) the Constitution of India 1950 has enlarged the powers of Parliament and under that proviso Parliament can do what the Central Legislature could not under section 107 (2) of the Government of India Act 1935 and enact a law adding to, amending, varying or repealing a law of the State when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can act under the proviso to Article 254 (2) repeal a State law. But where it does not expressly do so even then the State law will be void under that provision if it conflicts with a later law with respect to the same matter that may be enacted by Parliament.

There is no express repeal of Bombay Act XXXVI of 1947 by Central Act LII of 1950 in terms of the proviso to Article 254 (2). But the Central Act is legislation covering the same ground and the law of the Centre should prevail over that of the State. The subject of enhanced punishment that is dealt with in Bombay Act XXXVI of 1947 is also comprised in Central Act LII of 1950, the same being limited to the case of hoarding of foodgrains.

Accordingly section 2 of the Bombay Act cannot prevail against section 7 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946) as amended by Act No. LII of 1950.

Appeal under Article 132 (1) of the Constitution of India from the judgment and order dated 20th January, 1953, of the High Court of Judicature at Bombay in Criminal Revision Application No. 642 of 1952.

I C Dalal and P K Chatterjee, Advocates, for Appellant

M C Setalvad, Attorney General of India (P A Mehta and P G Gokhale, Advocates, with him) for Respondent

The Judgment of the Court was delivered by

Venkatarama Ayyar, J—This is an appeal against the judgment of the High Court of Bombay dismissing a revision petition filed by the appellant against his

conviction under section 7 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946)

The charge against the appellant was that on 6th April, 1951, he had transported 15 maunds of juwar from his village of Khanjrol to Mandvi without a permit, and had thereby contravened section 5 (1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949. The Resident First Class Magistrate of Bardoli who tried the case, found him guilty, and sentenced him to imprisonment till the rising of the Court and a fine of Rs 500. The conviction and sentence were both affirmed by the Sessions Judge, Surat, on appeal. The appellant thereafter took up the matter in revision to the High Court of Bombay, and there for the first time, took the objection that the Resident First Class Magistrate had no jurisdiction to try the case, because under section 2 of the Bombay Act No XXXVI of 1947 the offence was punishable with imprisonment, which might extend to seven years and under the Second Schedule to the Criminal Procedure Code, it was only the Sessions Court that had jurisdiction to try such offence. The answer of the State to this contention was that subsequent to the enactment of the Bombay Act No XXXVI of 1947, the Essential Supplies (Temporary Powers) Act had undergone substantial alterations, and was finally re-cast by the Central Act No LII of 1950, that the effect of these amendments was that Act No XXXVI of 1947 had become inoperative, that the governing Act was Act No LII of 1950, and that as under that Act, the maximum sentence for the offence in question was three years, the Resident First Class Magistrate had jurisdiction over the offence.

The revision petition was heard by a Bench consisting of Bavdekar and Chinnai, JJ. Bavdekar J., was of the opinion that the amendments to the Essential Supplies (Temporary Powers) Act including the re-enactment of section 7 in Act No LII of 1950, did not trench on the field covered by the Bombay Act No XXXVI of 1947, which accordingly remained unaffected by them. Chinnai, J., on the other hand held that both Act No XXXVI of 1947 and Act No LII of 1950, related to the same subject-matter, and that as Act No LII of 1950 was a Central legislation of a later date, it prevailed over the Bombay Act No XXXVI of 1947. On this difference of opinion, the matter came up under section 429, Criminal Procedure Code for hearing before Chagla, C J., who agreed with Chinnai, J., that there was repugnancy between section 7 of Act No LII of 1950 and section 2 of the Bombay Act No XXXVI of 1947, and that under Article 254 (2), the former prevailed, and the revision petition was accordingly dismissed. Against this judgment, the present appeal has been preferred on a certificate under Article 132 (1), and the point for determination is whether contravention of section 5 (1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949, is punishable under section 2 of the Bombay Act No XXXVI of 1947, in which case the trial by the Resident First Class Magistrate would be without jurisdiction, or whether it is punishable under section 7 of the Essential Supplies (Temporary Powers) Act, as amended by Act No LII of 1950, in which case, the trial and conviction of the appellant by that Magistrate would be perfectly legal.

It is now necessary to refer in chronological sequence to the statutes bearing on the question. We start with the Essential Supplies (Temporary Powers) Act No XXIV of 1946 enacted by the Central Legislature by virtue of the powers

conferred on it by 9 and 10, George VI, Chapter 39. It applied to the whole of British India. Section 3 of the Act conferred power on the Central Government to issue orders for regulating the production, supply and distribution of essential commodities, and under section 4, this power could be delegated to the Provincial Government. Section 7 (1) provided for punishment for contravention of orders issued under the Act, and ran as follows:

"If any person contravenes any order made under section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty."

Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall make such direction unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property.

The State of Bombay considered that the maximum punishment of three years' imprisonment provided in the above section was not adequate for offences under the Act, and with the object of enhancing the punishment provided therein, enacted Act No XXXVI of 1947. Section 2 of the said Act provided (omitting what is not material for the present purpose) that

"Notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act, 1946, whoever contravenes an order made or deemed to be made under section 3 of the said Act, shall be punished with imprisonment which may extend to seven years but shall not, except for reasons to be recorded in writing, be less than six months and shall also be liable to fine."

This section is avowedly repugnant to section 7 (1) of the Essential Supplies (Temporary Powers) Act. Section 107 (2) of the Government of India Act, which was the Constitution Act then in force, enacted that

"Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor General has received the assent of the Governor-General, the Provincial law shall in that province prevail but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

On the footing that the subject-matter of Act No XXXVI of 1947 fell within the Concurrent List, the Bombay Government obtained the assent of the Governor-General therefor, and thereafter, it came into force on 25th November, 1947. The position therefore was that by reason of section 107 (2) of the Government of India Act, Act No XXXVI of 1947, prevailed in Bombay over section 7 of the Essential Supplies (Temporary Powers) Act, but at the same time, it was subject under that section to all and any "further legislation with respect to the same matter," that might be enacted by the Central Legislature.

The contention of the State is that there was such further legislation by the Central Legislature in 1948, in 1949 and again in 1950, and that as a result of such legislation, section 2 of the Bombay Act No XXXVI of 1947, had become inoperative. In 1948, there was an amendment of the Essential Supplies (Temporary Powers) Act, whereby the proviso to section 7 (1) was repealed and a new proviso substituted, which provided *inter alia* that,

"Where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should be made not in respect of the whole, or as the case may be, a part of the property."

The Essential Supplies (Temporary Powers) Act was again amended in 1949. Under this amendment, the proviso to section 7 (i) was repealed, and a new clause substituted in the following terms

"(b) Where the contravention is of an order relating to foodstuffs, the Court shall (i) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, unless for reasons to be recorded, it is of opinion that a sentence of fine only will meet the ends of justice, and

(ii) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part of the property

Then came Central Act No LII of 1950, under which the old section 7 was repealed and a new section enacted in the following terms

"(1) If any person contravenes any order under section 3 relating to cotton textiles he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine and any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government

(2) If any person contravenes any order under section 3 relating to foodstuffs,—

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice and

(b) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government unless for reasons to be recorded the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property

Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrains exceeding twice the maximum quantity so prescribed the Court shall—

(a) sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession, and

(b) direct that the whole of such foodgrain in excess of the prescribed quantity shall be forfeited to the Government

Explanation—A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section

(3) If any person contravenes any order under section 3 relating to any essential commodity other than cotton textiles and foodstuffs he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides, any property in respect of which the Court is satisfied that the order has been contravened may be forfeited to the Government

(4) If any person to whom a direction is given under sub-section (4) of section 3 fails to comply with the direction he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both"

It must be mentioned that while the amendments of 1948 and 1949 were made when section 107 (2) of the Government of India Act was in force, the Constitution of India Act had come into operation, when Act No LII of 1950 was enacted. Article 254 (2) of the Constitution is as follows

"Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

This is, in substance, a reproduction of section 107 (2) of the Government of India Act, the concluding portion thereof being incorporated in a proviso with further additions. Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under section 107 (2) of the Government of India Act, it was observed by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion*¹, that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial Statute. That would appear to have been the position under section 107 (2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List. Now, by the proviso to Article 254 (2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under section 107 (2) of the Government of India Act and enact a law adding to, amending, varying or repealing a law of the State when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can, acting under the proviso to Article 254 (2), repeal a State law. But where it does not expressly do so even then the State law will be void under that provision if it conflicts with a later law with respect to the same matter "that may be enacted by Parliament."

In the present case, there was no express repeal of the Bombay Act by Act No. LII of 1950 in terms of the proviso to Article 254 (2). Then the only question to be decided is whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central Legislature in 1948, 1949 and 1950 are "further legislation" falling within section 107 (2) of the Government of India Act or "law with respect to the same matter" falling within Article 254 (2). The important thing to consider with reference to this provision is whether the legislation is 'in respect of the same matter'. If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character then Article 254 (2) will have no application. The principle embodied in section 107 (2) and Article 254 (2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

Considering the matter from this standpoint the first question to be asked is, what is the subject matter of the Bombay Act No. XXXVI of 1947? The preamble recites that it was "to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946." Then the next question is, what is the scope of the subsequent legislation in 1948, 1949 and 1950? As the offence for which the appellant has been convicted was committed on 6th April, 1951, it would be sufficient for the purpose of the present appeal to consider the effect of Act No. LII of 1950, which was in force on that date. By that Act, section 7 (1) of the Essential Supplies (Temporary

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TABLE OF CASES REPORTED.

SUPREME COURT OF INDIA.				PAGES
Amaldas v State of Bombay	(S C) 831
Hira Lal Dixit v State of Uttar Pradesh	..	..	..	(S C) 846
Jumuna Prasad Mukhariya v Lachhi Ram	..	..	..	(S C) 835
Ranarajya Singh v Bagnath Singh	..	..	..	(S C) 838
Saghir Ahmed v State of U P	..	..	..	(S C) 819
Sebadri v District Magistrate, Tanjore	..	..	..	(S C) 842

INDEX TO REPORTS.

Constitution of India (1950), Article 19 (1) (g) and (6)—"Right to carry on trade or business"—If contravened by condition in licence issued under the Cinematograph Act (II of 1918), section 8, requiring exhibition of one or more "approved films" as directed by the Government at each performance .. (S C) 842

Constitution of India (1950), Article 254 (2)—Scope and effect—Central Act (LII of 1950) amending Essential Supplies Temporary Powers Act (XXIV of 1946) section 7—If prevails over section 2 of Bombay Act (XXXVI of 1947) providing for enhanced punishment—Doctrine of implied repeal .. (S C) 851

Contempt of Court—Party to pending appeal distributing leaflets in the Court premises containing passage likely to hinder or obstruct the due course of administration of justice and making remarks about opposite party—Contempt—Courts power to punish for .. (S C) 846

Representation of the People Act (XLIII of 1951), sections 123 (5) and 124 (5)—Constitutional validity—If interfere with fundamental right to freedom of speech under Article 19 (1) (a) of the Constitution of India (1950)—Section 100 (2) (b) of Act (XLIII of 1951)—Effect .. (S C) 835

Representation of the People Act (XLIII of 1951), section 123 (7)—Officers and servants of candidate's father (who was the proprietor of an estate) and paid by the father working for candidate in addition to other workers—If contravenes section 77 and amounts to corrupt practice .. (S C) 838

Uttar Pradesh Road Transport Act (II of 1951)—Provision for nationalisation of motor bus transport—Constitutional validity—Provisions if infraction of fundamental rights under Article 19 (1) (g) and void under Article 15 of the Constitution of India—Exception under clause (6) of Article 19 (before its amendment)—Applicability and burden of proof—Article 31 (2)—Applicability—Article 14 if offended—Articles 301 and 304—Scope and effect .. (S C) 819